Employment Tracker

December 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		
Exclusion of employees in partial retirement from social plan benefits as inadmissible age discrimination? **Compensation due to age discrimination under Sec. 15 (1) of the German General Equal Treatment Act (*AGG*)**	16.12.2021 - 8 AZR 303/20 -	The Federal Labour Court decides whether the exclusion of employees with partial retirement agreements from social plan benefits constitutes age discrimination. The parent company of the defendant employer had decided that various areas - including the area in which the plaintiff also worked - were to be relocated to another location. To this end, a group works agreement, which is at the same time a reconciliation of interests, and a social plan were signed. Section 1 of the social plan stipulated, among other things, that it should not apply to employees with partial retirement arrangements. The plaintiff was in partial retirement on the basis of a corresponding agreement. Like all other employees in partial retirement who were affected by the relocation, the plaintiff did not receive a transfer offer. Instead, he remained at the original location until the end of his partial retirement.

		The plaintiff is of the opinion that he was discriminated against because of his age, as he was not offered a transfer. Without the violation of the prohibition of discrimination, he would have been entitled to social plan benefits, which he is now claiming as damages. Both the Giessen Labour Court and the Hessen Regional Labour Court were of the opinion that the plaintiff was not directly disadvantaged because of his age. There was no discrimination because the employees in partial retirement were not confronted with a relocation or the loss of their jobs, but were employed unchanged at the original location until retirement. In his appeal to the Federal Labour Court, the plaintiff would still like to receive the damages he has claimed.
Federal Social Court		
Accident insurance coverage on the way from the bedroom to the home office	08.12.2021 - B 2 U 4/21 R -	In dispute is whether an accident on the way from the bedroom to the home office is to be recognized as an occupational accident. The plaintiff slipped in the morning on his way from his bedroom to his home office one floor below and fractured a thoracic vertebra. The incident was reported to the relevant employers' liability insurance association as an occupational accident. The liability insurance association refused to grant compensation benefits for the accident because the accident was not an occupational accident. Accident insurance protection in a private home on the way to the purpose of starting work for the first time only begins when the employee reaches his home office. The Aachen Social Court determined the existence of an occupational accident and thus ruled in favour of the plaintiff. The Regional Social Court of North Rhine-Westphalia, on the other hand, is of the opinion that the first morning commute to the home office is not a commute to work, but an uninsured preparatory act that merely precedes the actual insured activity.

		The plaintiff, on the other hand, is of the opinion that the route to the first start of work in the home office in the private home must be an insured company route, because employees in the home office would otherwise be in a worse position than employees who work in the company. With his appeal before the Federal Social Court, the plaintiff would therefore like to continue to achieve a determination of an occupational accident.

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		
Is the exclusion of the provision of necessary work equipment permissible in general terms and conditions?	10.11.2021 - 5 AZR 334/21 -	**Bicycle delivery personnel (so-called "riders") who deliver food and beverages and receive their orders via a smartphone app are entitled to have the employer provide them with the work equipment essential for carrying out their work. This includes a roadworthy bicycle and a suitable Internet-capable cell phone. Deviations from this principle can be agreed by contract. If this is done in the employer's general terms and conditions, they are only valid if the employee is promised appropriate financial compensation for the use of his or her own bicycle and cell phone.** Facts The Federal Labour Court had to decide whether the exclusion of the provision of necessary work equipment by general terms and conditions (GTC) without compensation is permissible. The plaintiff employee delivers food and beverages as a bicycle delivery employee, which customers order via the Internet from various restaurants. He is contractually obligated under a GTC to use his own bicycle and cell phone for the delivery trips.

		The employee is of the opinion that the defendant employer must provide him with a functioning bicycle as well as a suitable cell phone because these are necessary work equipment. The general terms and conditions obliging him to use his own bicycle and cell phone are ineffective. Therefore, the employee claims with his lawsuit the provision of the corresponding work equipment by the employer. The Regional Labour Court of Hessen upheld the claim. The Federal Labour Court now had to decide whether the plaintiff was entitled to the claim asserted on the basis of the appeal filed by the defendant employer. The decision of the Federal Labour Court The Federal Labour Court ruled that the employer must provide the plaintiff with both a functioning bicycle and a suitable cell phone as necessary work equipment. The Federal Labour Court is of the opinion that the use of the plaintiff's own bicycle and cell phone as agreed in the General Terms and Conditions of Business unreasonably disadvantages the plaintiff and is therefore invalid. Passing on the risk of wear and tear, depreciation, loss or damage to the employee contradicts the basic legal idea of the employment relationship, according to which the employer must provide the work equipment essential for the performance of the agreed activity and ensure that it is in working order. According to the Federal Labour Court, a clause obliging the employee to use his own means is only permissible if there is sufficient compensation for this disadvantage. The statutory possibility of being able to demand reimbursement of expenses under Section 670 of the German Civil Code (BGB) does not constitute adequate compensation.
Claim for compensation under the German General Equal Treatment Act (*AGG*)	25.11.2021 - 8 AZR 313/20 -	**The employer's violation of regulations containing procedural and/or promotional obligations in favour of severely disabled persons regularly justifies the presumption (Sec. 22 AGG) that the unsuccessful severely disabled applicant was not considered in the selection/job filling procedure because of the severe disability and was thus disadvantaged because of the severe disability. These provisions include Sec. 165 S. 1 SGB IX, according to which the departments of public employers**

Discrimination due to a disability		**must notify the employment agencies at an early stage of vacancies and new jobs to be filled as well as new jobs. In order to comply with this provision, the mere publication of the job offer via the job exchange of the Federal Employment Agency is not sufficient.** Facts It was in dispute whether the plaintiff was entitled to compensation pursuant to Section 15 (2) of the German General Equal Treatment Act (AGG) due to his disadvantage as a severely disabled person. The severely disabled plaintiff applied in November 2017 for a job offer of the defendant district for a position as "Head of the Legal and Municipal Office". The job advertisement stated, among other things, the following requirements: ▪ Completed advanced academic university studies (Master's degree or equivalent) in the field of law or Second State Examination in Law (fully qualified lawyer). ▪ several years of relevant professional experience ▪ Extensive legal knowledge in the areas of responsibility, in particular in the field of municipal double-entry accounting ▪ several years of relevant management experience, preferably in a comparable management position with regard to management span and scope of duties in the municipal sector The plaintiff was not invited to an interview by the defendant district. Instead, the plaintiff was informed that the position had been filled elsewhere. Thereupon, the plaintiff turned to the defendant district under the subject "Complaint according to Sec. 13 AGG and claim for compensation according to Sec. 15 (2) AGG". He complained that he had not been considered as a severely disabled person in the preliminary procedure of the application procedure. Additionally he asserted unsuccessfully a claim for damages in accordance with Sec. 15 (2) AGG. The plaintiff is now asserting the requested claim for compensation together with interest in court. Because the defendant district did not invite him to an interview, the district discriminated against him because of his severe disability. He bases this, among other things, on the fact that the defendant district did not report the

		vacant job to the competent employment agency, contrary to Sec. 168 S. 1 SGB IX. In addition, the failure to respond to his complaint under Sec. 13 (1) AGG justifies the presumption that he was not taken into account because of his severe disability. In contrast, the defendant county is of the opinion that it was not obligated to invite the plaintiff to an interview because he was obviously professionally unsuitable. The plaintiff passed the second state law examination in December 2016. Since then, he has been running a law firm. Furthermore, the defendant district claims that the non-response to a possible complaint of the plaintiff pursuant to Sec.13 AGG does not constitute an indication of discrimination. That follows alone from the fact that Sec. 13 AGG is not applicable to rejected applicants. The lower courts decided that the plaintiff is not entitled to the compensation claim asserted. The Federal Labour Court must now decide whether the plaintiff is entitled to compensation after all. <u>The decision of the Federal Labour Court</u> The Federal Labour Court awarded the plaintiff the requested compensation. The fact that the plaintiff failed to report his disability pursuant to Sec. 168 S. 1 SGB IX justifies the assumption that the plaintiff was not taken into account in the selection/job filling procedure because of his severe disability and was thus disadvantaged because of his severe disability, according to the Federal Labour Court. On the question whether further offences against the procedure and/or promotion obligations met in favour of severely disabled humans were present, it did not depend therefore any longer. It was also irrelevant whether the failure of the defendant district to respond to the plaintiff's complaint could be an indication under Sec. 22 AGG that the plaintiff was discriminated against because of his severe disability.

Reduction of vacation entitlement due to short-time work permissible?	30.11.2021 - 9 AZR 225/21 -	**If individual working days are completely lost due to short-time working, this must be taken into account when calculating annual leave.** Facts The Federal Labour Court had to decide whether vacation entitlement may be reduced to "zero" in the event of short-time working. Due to the COVID-19 pandemic, the defendant employer agreed with the plaintiff to introduce short-time work "zero". Initially, the defendant granted the plaintiff residual leave from previous years. In the following months, the plaintiff did not work for entire months in some cases due to the short-time work introduced. As a result, the defendant reduced the plaintiff's vacation entitlement. The plaintiff is contesting this in her action. She is of the opinion that short-time working cannot lead to a reduction of her vacation entitlement and that she is therefore entitled to an unreduced vacation entitlement. There is no legal basis for reducing the vacation entitlement. The defendant, on the other hand, is of the opinion that a reduction of 1/12 is to be made for each full month of short-time work. Since there is no obligation to work during the short-time work due to the suspended performance obligations, no vacation entitlements arise. Both the Labour Court and the Düsseldorf Regional Labour Court upheld the defendant and consequently dismissed the action. The decision of the Federal Labour Court The Federal Labour Court has ruled that the reduction of vacation entitlements is permissible if individual working days are completely cancelled due to short-time working. The plaintiff's appeal was therefore unsuccessful.

		The Federal Labour Court explained that the loss of entire working days due to short-time work justified a recalculation of the vacation entitlement during the year. Working days lost due to short-time work agreed in individual contracts are not to be equated with periods of compulsory work either under national law or under Union law. This follows from Sec. 3 (1) Federal Vacation Act (Bundesurlaubsgesetz - BUrlG) , according to which the number of vacation days must in principle be calculated taking into account the work rhythm relevant for the vacation year. The plaintiff's vacation entitlement from the calendar year 2020 therefore does not exceed the vacation days calculated by the defendant, according to the Federal Labour Court.
Federal Social Court		
Entitlement of the Management Board of a Stock Corporation to Insolvency Benefits **Employee status of an Executive Board member**	03.11.2021 - BV 11 AL 4/20 R -	**The status as a member of the management board does not preclude the assumption of employee status and thus an entitlement to insolvency benefits if the parties have not concluded a contract qualifying as a service contract. The concept of employee under insolvency benefit law is to be understood in terms of labour law. Accordingly, the Senate abandons its previous case law, which assumed a special concept of employee for the insolvency benefit claim.** Facts The question in dispute was whether the plaintiff was entitled to insolvency benefits despite his capacity as a member of the management board of a stock corporation (known in Germany as an AG). The plaintiff initially worked for the AG as an employee and was later appointed to the management board. Approximately 1 ½ years after he left the management board, insolvency proceedings were opened against the assets of the AG.

		The plaintiff's application for insolvency benefits was rejected by the Federal Employment Agency. The reason given for the rejection was that the plaintiff did not qualify as an employee because as a member of the Executive Board he held a position similar to that of an entrepreneur. The lower courts ruled in favor of the plaintiff and awarded him the insolvency benefits he sought. Both the Regensburg Social Court and the Bavarian State Social Court were of the opinion that the plaintiff should be regarded as an employee. The fact that the plaintiff was appointed to the Board of Management of the AG was not decisive, because he did not actually hold this position. Rather, he was bound by instructions. Accordingly, the contract underlying the internal relationship was to be qualified as an employment contract. <u>The decision of the Federal Social Court</u> The Federal Social Court has ruled that the plaintiff is entitled to short-time allowance. In the opinion of the Federal Social Court, the plaintiff was to be regarded as an employee during the insolvency benefit period, even though he was also a member of the AG's management board at that time. According to the Federal Social Court, the concept of employee under insolvency benefit law is to be understood in terms of labour law. Since the plaintiff had concluded an employment contract with the AG which had not been amended or cancelled either in connection with his appointment to the Executive Board or subsequently by a separate service contract or any other agreement under the law of obligations, he was to be regarded as an employee. The mere position as a member of a governing body does not prevent him from being classified as an employee, since the act of appointment is to be judged legally independently of the service contract. Since no service contract was concluded between the parties with regard to his activity on the Board of Management, the plaintiff is to be regarded as an employee. Accordingly, the plaintiff is entitled to the asserted claim to insolvency benefits.

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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
Act Amending the Law on the Protection against Infection and Other Laws on the Occasion of the Repeal of the Determination of the Epidemic Situation of National Significance	22.11.2021	On November 24, 2021, the law amending the Infection Protection Act (IfSG) came into force, which has far-reaching consequences for working life. We provide an overview of the new regulations: Admission to the workplace only with proof of vaccination, recovery or negative Corona test (so called "3G" rule) ▪ According to Section 28b (1) IfSG, from now on only vaccinated, recovered or tested employees with corresponding proof are allowed to enter the workplace where personal contact is not excluded. Employees must therefore carry proof of a complete vaccination, proof of recovery or proof of a negative Corona test (not older than 24 hours, 48 hours for PCR tests) with them, keep it available for inspection or deposit it with the employer. ▪ According to Section 28b (3) IfSG, employers are obliged to monitor the “3G” proof on a daily basis and to document it regularly. To the extent necessary to fulfill these obligations, employers may process personal data of their employees, in particular on vaccination-, sero- and test status with regard to COVID-19. These data may also be used to develop or adapt company hygiene concepts on the basis of an occupational health and safety risk assessment. The data must be deleted no later than 6 months after it has been collected. ▪ If employees enter the workplace without appropriate “3G” proof, they commit an administrative offense that can be punished with a fine of up to €25,000 (Section 72 (1a) No. 11b, (2) IfSG). The same applies

		to employers if they fail to fulfill their inspection obligations or do not do so properly (Section 72 (1a) No. 11d IfSG). "Comeback" of the home office obligation ▪ Under Section 28b (4) IfSG, employers are once again obliged to offer employees who work in an office or perform comparable activities the opportunity to provide services from home. This does not apply if there are compelling operational reasons to the contrary. ▪ In turn, employees are obligated to accept the offer if there are no reasons for them not to work from home. For more information on the new regulations, please see our Legal Update (only available in German language)
Ordinance on the Reference Period and Extension of Short-Time Work Relief (Kurzarbeitergeldverlängerungsverordnung - KugverlV)	24.11.2021	The options for facilitated access to and the period of entitlement to short-time allowance have been extended once again. The ordinance regulates in detail: ▪ The requirements for access to short-time allowance will continue to be reduced until March 31, 2022: – The number of employees who must be affected by the loss of work in the company remains lowered from at least one-third to at least 10 percent; and – the build-up of negative working time balances prior to the granting of cyclical short-time allowance will continue to be completely waived. ▪ Access for temporary workers to short-time allowance will remain open until March 31, 2022. ▪ Employers will be reimbursed for the social security contributions they are solely responsible for paying during short-time working in the amount of 50% on application in a lump-sum form.

		The amendments shall enter into force with effect from January 1, 2022 and shall expire at the end of March 31, 2022.
Coalition agreement 2021	24.11.2021	Recently, the coalition formed by SPD, FDP and Green Party presented the contents of the coalition agreement. What does the coalition agreement envisage for labour and social law? We provide a brief overview: Continuing education: Education (part) time & qualification money ▪ Pursuit of a targeted national continuing education strategy ▪ Creation of an education (part) time: Employees are to receive financial support for labor market-related continuing education. The prerequisite is to be an agreement between employer and employees. The Federal Employment Agency is to examine the eligibility requirements. ▪ Creation of a qualification allowance based on the short-time working allowance: The qualification allowance is intended to enable companies undergoing structural change to retain their employees in the company through qualification and to secure skilled workers. Company agreements are to be a prerequisite for this. ▪ Expansion of transfer short-time allowance & further development of SGB III instruments in transfer companies Enabling flexible working hours ▪ 8-hour working day remains standard ▪ However, within the framework of collective agreements, regulations should initially be possible for a limited period that allow employees to flexibly structure their working hours under certain conditions. ▪ Creation of a limited possibility to deviate from the currently existing regulations of the Working Hours Act with regard to the maximum daily working hours, if collective agreements or company agreements provide for this (experimental areas).

		▪ Alignment of working time law with the case law of the European Court of Justice on the recording of working time, in which flexible working time models, in particular trust-based working time, remain possible Home office & mobile work ▪ Elaboration of flexible and appropriate solutions for the healthy design of home office ▪ Home office should be legally distinguished from telework and the scope of the Workplace Ordinance as a mobile work option. ▪ Creation of a right of discussion on mobile working and home office for employees in suitable jobs ▪ The employer should only be able to object if operational concerns conflict with this. More minimum wage, increase in mini- & midi-job limit ▪ Adjustment of the minimum wage to €12 per hour ▪ Decision on any further increase steps by the independent minimum wage commission ▪ Support for the EU Commission's proposal for a directive on appropriate poverty-proof minimum wages to strengthen the collective bargaining system ▪ Raising the mini-job limit to €520 and the midi-job limit to €1,600 ▪ Removal of barriers that make it difficult to take up employment that is subject to compulsory insurance coverage Limitation of fixed-term employment contracts ▪ Limitation of fixed-term employment contracts with the same employer to 6 years; narrowly defined exceptions should remain possible. ▪ Abolition of budgetary fixed-term contracts in the public sector ▪ Step-by-step reduction of fixed-term contracts without substantive reasons at the federal government as an employer.

		Temporary Employment & Labour Mobility ▪ Examination of need for amendments to the Temporary Employment Act due to European case law. ▪ Seasonal workers should receive full health insurance coverage from the first day. ▪ Strengthening of "Fair Mobility" -> better information of employees about their rights Collective bargaining autonomy ▪ Strengthening collective bargaining autonomy, collective bargaining partners and collective bargaining commitment ▪ Public procurement by the federal government should be tied to compliance with a collective bargaining agreement that is representative of the industry in question. ▪ Preventing company spin-offs where the previous owner is the same in order to avoid collective bargaining by ensuring that the applicable collective bargaining agreement continues to apply; Section 613a of the German Civil Code remains untouched. ▪ Development of further steps to strengthen collective bargaining in dialog with the social partners. Workplace co-determination ▪ Works councils should be able to decide for themselves whether to work in analogue or digital form ▪ Testing online works council elections in a pilot project ▪ Creation of a right for trade unions to digital access to workplaces in line with their analogue rights ▪ Evaluation of the Works Council Modernization Act ▪ Classification of obstruction of democratic co-determination as an official offense ▪ Examination, together with the churches, of the alignment of church labour law with state labour law; proclamation-related activities remain exempt. Possibilities for avoiding corporate co-determination are to be minimized

		▪ Transfer of group attribution from the Co-Determination Act to the One-Third Participation Act, provided there is de facto real control. Digital platforms ▪ Promoting good and fair working conditions on digital platforms Occupational health and safety ▪ Adapting occupational health and safety to new challenges ▪ Strengthening occupational integration management ▪ Support in prevention and implementation of occupational health and safety Statutory pension: funded pension ▪ Safeguarding the minimum pension level of 48 percent ▪ Contribution rate not to rise above 20 percent ▪ No pension cuts & no increase in statutory retirement age ▪ Partial funding of the statutory pension insurance ▪ Compulsory old-age provision with freedom of choice for the self-employed who are not subject to a compulsory old-age provision system Strengthening the company pension scheme ▪ Strengthening of company pension plans through investment opportunities with higher returns ▪ Implementation of the social partner model already launched in the penultimate legislative period More rights for severely disabled employees and parents ▪ Creation of a fourth stage of the compensatory levy in Sec. 160 SGB IX for companies that do not employ a person with disabilities despite an obligation to do so.

		▪ Applications submitted in full to the Integration Office are to be considered approved after six weeks without notification (fictitious approval). ▪ Increase in the number of sick days for children to 15 days per child and parent, and to 30 days for single parents. ▪ Extension of parental leave protection by three months after return to work ▪ Possibility of a two-week paid leave of the partner after the birth of a child parallel to maternity leave, also for single parents ▪ Extension of the partner months in the basic parental allowance by one month, also for single parents ▪ Extension of parental allowance entitlement for foster parents, self-employed persons and parents whose children are born before the 37th week of pregnancy

Local presence: your contacts

Dr. Ulrich Fülbier
Head of labour and employment law
Prinzregentenstraße 22
80538 Munich
Tel. +49 89 3090667-62
ufuelbier@goerg.de

Dr. Thomas Bezani
Kennedyplatz 2
50679 Cologne
Tel. +49 221 33660-544
tbezani@goerg.de

Dr. Axel Dahms
Kantstraße 164
10623 Berlin
Tel. +49 30 884503-122
adahms@goerg.de

Burkhard Fabritius, MBA
Alter Wall 20 – 22
20457 Hamburg
Tel. +49 40 500360-755
bfabritius@goerg.de

Dr. Dirk Freihube
Ulmenstraße 30
60325 Frankfurt am Main
Tel. +49 69 170000-159
dfreihube@goerg.de

Dr. Ralf Hottgenroth
Kennedyplatz 2
50679 Cologne
Tel. +49 221 33660-504
rhottgenroth@goerg.de

Dr. Christoph J. Müller
Kennedyplatz 2
50679 Cologne
Tel. +49 221 33660-524
cmueller@goerg.de

Dr. Lars Nevian
Ulmenstraße 30
60325 Frankfurt am Main
Tel. +49 69 170000-210
lnevian@goerg.de

Dr. Marcus Richter
Kennedyplatz 2
50679 Cologne
Tel. +49 221 33660-534
mrichter@goerg.de

Dr. Frank Wilke
Kennedyplatz 2
50679 Cologne
Tel. +49 221 33660-508
fwilke@goerg.de