Employment Tracker

January 2022

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.

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 Social Court		
Accident insurance coverage on the way from the bedroom to the home office	08.12.2021 - B 2 U 4/21 R -	**An employee who falls on the way from bed to the home office for the first time in the morning is protected by the statutory accident insurance.** *The 2nd Senate of the Federal Social Court decided this on December 08, 2021.* Facts In dispute was 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 asso-

		ciation 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, was 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, was 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. <u>The decision of the Federal Social Court</u> The plaintiff's appeal was successful. The Federal Social Court ruled that the plaintiff suffered an occupational accident when he fell on his way to his home office in the morning. The Federal Social Court thus confirmed the decision of the Aachen Social Court. The 2nd Senate of the Federal Social Court justified its decision by stating that taking the stairs to the home office was solely for the purpose of starting work for the first time and was therefore insured as a commute in the interest of the employer.

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 minimum wage for the period of an internship	19.01.2022 - 5 AZR 217/21 -	The Federal Labour Court decides whether a six-month internship entitles the plaintiff to minimum wage. The plaintiff completed a six-month internship on the nursing ward of the defendant clinic. The background to this was that, according to the university's admission regulations, she had to prove that she had completed a six-month nursing internship before beginning her studies. At the request of the nursing directorate, the plaintiff submitted a certificate from the university before the start of the internship stating that the planned internship was a mandatory internship for admission to medical school. Accordingly, the plaintiff was not compensated for her work as an intern. The plaintiff is of the opinion that the six-month internship should be remunerated in accordance with the Minimum Wage Act because the internship completed was an orientation for vocational training. Such an internship is only possible for a period of up to three months without remuneration. In addition, she was entitled to pro rata compensation for vacation. Accordingly, the plaintiff's action seeks payment of the minimum wage for the internship and pro rata compensation for vacation. The defendant, on the other hand, is of the opinion that the internship in question was a compulsory internship and that it therefore did not have to pay the minimum wage pursuant to Section 22 (1) sentence 2 no. 1 MiLoG.

		The lower courts dismissed the action. The Regional Labour Court essentially based its decision on the fact that the internship at issue was to be regarded as a mandatory internship and was therefore not subject to the scope of application of the Minimum Wage Act pursuant to Section 22 (1) Sentence 2 No. 1 MiLoG. With her appeal to the Federal Labour Court, the plaintiff would still like to achieve that she is awarded the payment of minimum wage.
Employee status of a pilot **Applicability of German law**	25.01.2022 - 9 AZR 139/21 -	The main issue in dispute is whether the plaintiff pilot was employed by the defendant airline as an employee and whether the employment relationship was terminated with legal effect. The plaintiff worked as a pilot for the defendant airline based in Ireland. However, the defendant airline often does not hire the pilots working for it as employees. Instead, the pilots are supposed to found their own companies and work as self-employed persons. This was also the case with the plaintiff. There were no contractual agreements between the plaintiff and the defendant airline. Rather, the plaintiff is a shareholder of a so-called pilot company (W. Ltd.), which had concluded a contract for pilot services with a recruitment company. The recruitment company, in turn, had contractual relationships for pilot services with the defendant airline. The pilot received her remuneration from W. Ltd. or the recruitment company. The plaintiff was informed about her deployment times by the defendant airline four weeks in advance online via a service tablet. The plaintiff had to download the so-called "flight plan" from computers located in the crew room as well as personally register her start of duty from there. In the event of a flight cancellation due to weather conditions, strike or illness, the plaintiff did not receive any remuneration. The plaintiff had the right to refuse assignments. Bremen was assigned to the plaintiff as her home base by the defendant airline. 2/3 of her flights started or ended there. In December 2016, the defendant airline terminated the plaintiff by e-mail. The plaintiff appealed against this. Both the Labour Court and the Regional Labour Court ruled in favour of the plaintiff pilot. The Regional Labour Court assumed that an employment relationship existed between the plaintiff and the defendant

		airline. In particular, the fact that the plaintiff was a shareholder of W. Ltd. was not an obstacle to this. This company is a pure pilot company, which does not own any aircraft and does not operate any flights. In any case, an employment relationship with the defendant is fictitious due to violations of the German Personnel Leasing Act (*AÜG*) (Sec. 10 (1) Sentence 1 AÜG). The notice of termination given by e-mail was invalid because the written form requirement under Sec. 623 BGB was not complied with. With its appeal, the defendant airline continues to seek the dismissal of the action.
Establishment of an employment relationship due to exceeding the maximum duration of temporary employment pursuant to Sections 9, 10 of the German Temporary Employment Act (*AÜG*) **Effectiveness of extension of the maximum duration of temporary employment by collective bargaining agreement vis-à-vis non-union members**	26.01.2022 - 4 AZR 26/21 -	The Federal Labour Court has to decide on the question whether an employment relationship is deemed to have come into existence between the parties due to the long service of the plaintiff for the defendant in the context of a temporary employment pursuant to Sec. 9, 10 AÜG. The defendant is a member of the Association of the Metal and Electrical Industry of Baden-Württemberg (Südwestmetall). The plaintiff is not a member of the "IG Metall" trade union. Various employers, each within the framework of a temporary employment agency, leased the plaintiff to the defendant for several years. The relevant collective agreement for temporary work (TV Leiz) stipulates that temporary workers may be leased out for a maximum of 48 months. A general works agreement in place at the defendant provides for a maximum period of 36 months. The plaintiff is of the opinion that an employment relationship has come into existence between him and the defendant pursuant to Sec. 9, Subsection 1, No. 1b, 10, Subsection 1, Sentence 1, AÜG, because the statutory maximum assignment period of 18 months was exceeded. The defendant could not rely on the collective agreement extension of the maximum assignment period in the TV Leiz because the statutory authorization in Sec. 1 (1b) sentence 3 AÜG was unconstitutional. Moreover, the collective agreements based on Sec. 1 (1b) Sentence 3 AÜG are not company standards but content standards. Since he was not

		a member of “IG Metall” and thus not bound by collective bargaining agreements, this collective bargaining provision did not have a direct and binding effect on him. The Labour Court dismissed the action. The Regional Labour Court, on the other hand, ruled that an employment relationship had come into existence between the parties pursuant to §§ 9, 10 AÜG. Accordingly, the Regional Labour Court upheld the plaintiff's claim. In its appeal to the Federal Labour Court, the defendant continues to seek dismissal of the action.
Mass dismissal **Invalidity of a termination due to breach against the obligation to transmit the notification to the works council to the employment agency from Sec. 17 (3) Sentence 1 Dismissal Protection Act (*KSchG*)**	27.01.2022 - 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 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 Labour Court.
European Court of Justice		
Are vacation periods to be taken into account for overtime pay? **Preliminary ruling of the Federal Labour Court**	13.01.2022 - C-415/20 -	The European Court of Justice has to rule on the question of whether a provision in a collective agreement, which only takes into account hours actually worked for the calculation of overtime bonuses, is contrary to Union law. The Federal Labour Court has referred this question to the European Court of Justice for a preliminary ruling. The parties to the main proceedings before the Federal Labour Court dispute whether vacation periods are to be taken into account for overtime bonuses. The collective bargaining agreement applicable to the employment relationship stipulates that overtime bonuses of 25% are paid for periods exceeding a certain number of hours worked in the respective calendar month. Since the employer did not take into account the hours accounted for vacation in the calculation in the month of August 2017 and therefore did not pay the plaintiff any overtime surcharges, the plaintiff claims overtime surcharges for this month. He believes that vacation time should be included in the calculation of overtime pay. The courts previously dealing with the matter were of the opinion that vacation periods were not to be included in the calculation of overtime bonuses. The wording of the collective agreement clearly refers exclusively to the hours actually worked. The Federal Labour Court, on the other hand, assumes that not taking vacation periods into account when calculating overtime bonuses could constitute an incentive to forego vacation that is impermissible under European Union law. For this reason, the Federal Labour Court has referred this question to the European Court of Justice for a preliminary ruling.

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
Draft directive on improving working conditions in platform work	09.12.2021 *Press release of the European Commission*	The European Commission has presented a proposal for a directive to improve working conditions in platform work. The draft directive essentially provides for the following regulations: Employee status of "crowdworkers" The draft includes a legal presumption to the effect that platforms are to be regarded as "employers" insofar as at least two of five indicia of a list of control criteria are present. It should be possible to rebut this presumption if the platform operator proves that there is no employment relationship. The following criteria are to be relevant for the presumption to kick in: • Control and monitoring of the work performed by the client • Co-determination of the amount of payment for orders by the client • Restriction of the free organization of work, e.g. by prescribing working hours • Obligation of platform workers to comply with binding rules regarding appearance, behaviour towards the customer or work performance • Restriction of the possibility to build up a customer base, to perform work for third parties or to have work performed by third parties

		The presumption has significance in German law in particular because platform workers are entitled to the comprehensive employee protection rights due to their status as employees, and they are subject to social security contributions. New rights for platform workers when using algorithms Algorithms (automated systems) used on platforms for task assignment, monitoring, evaluation and award decisions are to be made more transparent under the draft directive. Decisions made by such an algorithm are to be monitored and reviewed by humans to ensure compliance with working conditions. Platform workers should have the right to challenge automated decisions. Enforcement, transparency and traceability Digital platforms should be required to provide employment records and key information about their operations and the people working through them to the relevant authorities. In addition, the possibility of a class action lawsuit is to be created to enforce the rights of platform workers.
New Section 129 of the Works Constitution Act (*BetrVG*) resolved: Works meetings and conciliation bodies possible by video conference	11.12.2021	The Act to Strengthen Vaccination Prevention against COVID-19 and to Amend Other Regulations in Connection with the COVID-19 Pandemic of December 10, 2021 added a new section 129 to the Works Constitution Act. Section 129 of the Works Constitution Act regulates in detail: • Conference until the end of March 19, 2022 if it is ensured that third parties cannot take note of the content of the meeting. Recording is not permitted. Participants taking part by means of video and telephone conference shall confirm their presence to the chairman of the conciliation body in text form. • The Bundestag may extend the current period once by up to three months.

		Similar regulations apply to executive employees and European bodies with the above-mentioned amendments to the SprAuG, EBRG, SEBG and SCEBG. The Act entered into force on December 12, 2021

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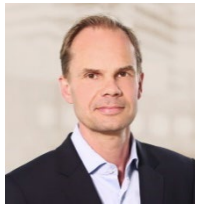

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