Employment Tracker

March 2022

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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.

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		
Avoidance of a termination agreement due to unlawful threat **Requirement of fair negotiation**	24.02.2022 - 6 AZR 333/21 -	**A termination agreement may have been concluded in violation of the requirement of fair negotiation. Whether this is the case must be decided based on the overall circumstances of the specific negotiation situation in each individual case. The mere fact that the employer makes the conclusion of a termination agreement dependent on the immediate acceptance of its offer does not in itself constitute a breach of duty, even if this results in the employee neither having a period of reflection nor being able to obtain requested legal advice.** Facts In dispute was whether the termination agreement concluded between the parties was validly contested on the grounds of unlawful threat and whether the termination declared after the contestation was valid.

		In a conversation with the managing director of the defendant, which was also attended by the defend-ant's attorney, the plaintiff employee was confronted with the accusation that she had unauthorizedly changed purchase prices for goods in the defendant's EDP system. She had not been informed beforehand that the conversation was to be about this accusation. She was then presented with a prepared termination agreement, according to which the employment rela-tionship was to end at the end of the month for operational reasons and she was to receive her full remu-neration until then. The termination agreement ended with a settlement receipt. After a break of about ten minutes, the plaintiff signed the agreement. Immediately thereafter, the plaintiff's husband, who was employed by the defendant and against whom similar allegations were made, also signed a termination agreement. Subsequently, the plaintiff declared that she contested the termination agreement. She had only concluded it because the defendant had unlawfully threatened her with immediate termination and criminal charges. The defendant thereupon terminated the employment relationship for cause or, in the alternative, for good cause. In her action, the plaintiff asserted the invalidity of both the termination agreement and the notices of termination. The Labour Court upheld the action. The Hamm Regional Labour Court considered the termination agree-ment to be effective and accordingly did not rule on the effectiveness of the termination without notice. It assumed that the requirement of fair negotiation had not been violated. The threat on the part of the defend-ant had not been unlawful in view of the concrete circumstances. The other negotiating conditions were not such as to arouse the plaintiff's instincts to flee. Unobjective, aggressive or insulting statements had not been made. Nor was the plaintiff's state of health impaired. The plaintiff contests this in her appeal. <u>The decision of the Federal Labour Court</u> The plaintiff's appeal was unsuccessful before the Sixth Senate of the Federal Labour Court.

		Even if the course of the conversation described by the plaintiff is assumed to be in her favour, the Federal Labour Court held that the alleged threat was not unlawful. In the present case, a reasonable employer could have seriously considered both the declaration of an extraordinary termination and the filing of criminal charges. The defendant had not negotiated unfairly and thereby violated its obligations under § 311, Subsection 2, No. 1, in conjunction with § 241, Subsection 2, BGB. The plaintiff's freedom of decision was not violated by the fact that the defendant only submitted the termination agreement for immediate acceptance and that the plaintiff therefore had to decide on acceptance immediately.
Compensation under the General Equal Treatment Act (AGG) due to age discrimination **Reference for a preliminary ruling to the European Court of Justice**	24.02.2022 - 8 AZR 208/21 (A) - -	**The decision of the legal dispute depends on whether the direct discrimination on the grounds of age caused by the job advertisement is justified under the provisions of the General Equal Treatment Act (AGG). The answer to this question depends on the interpretation of the Equal Treatment Framework Directive 2000/78/EC. Therefore, the Federal Labour Court has referred the question to the European Court of Justice whether the Directive permits the justification of direct discrimination on grounds of age in a situation such as that in the main proceedings.** Facts The Federal Labour Court had to decide whether the defendant owes the plaintiff compensation pursuant to Section 15 (2) AGG due to a violation of the prohibition of discrimination on the grounds of age. The defendant operates an assistance service that supports disabled people in all matters relating to personal assistance. They can advertise a job offer with the defendant, among other things. For this purpose, the defendant provides them in advance with a questionnaire in which they can specify wishes with regard to the person of the assistant, such as their gender or age. If a placement is successful, the disabled person concludes a service contract with the defendant, and the assistant concludes an employment contract with the defendant.

		The plaintiff, who was born in 1968 and had previously worked as a so-called personal assistant, applied by e-mail to a job advertisement on the defendant's Internet portal. In this job offer, a 28-year-old severely disabled student was looking for a Personal Assistant in all areas of everyday life, who should prefer-ably be between 18 and 30 years old. The defendant informed the plaintiff that it had decided to hire an-other applicant due to the high number of applications. Subsequently, the plaintiff asserted claims for compensation against the defendant under the AGG. After the defendant rejected the claims, the plaintiff pursued them in the legal action. She took the view that she had been unlawfully discriminated against because of her age. The job advertisement and the defendant's questionnaire already provided evidence of this. The Labour Court ordered the defendant to pay compensation for salary. The Cologne Regional Labour Court dismissed the action. It explained that the job advertisement indicated a direct discrimination of the plaintiff because of her age in the sense of Sec. 22 AGG. The different treatment was justified in the con-troversy however due to the vocational requirements of the activity of the personal assistance in accordance with Sec. 8 (1) AGG. The unequal treatment is beyond that after Sec. 10 AGG objectively justified. The plaintiff contests this with her appeal. The decision of the Federal Labour Court In the opinion of the Federal Labour Court, the decision of the legal dispute depends on the interpretation of Union law, specifically on the interpretation of the Framework Directive on Equal Treatment. The Directive must be interpreted in light of the requirements of the Charter of Fundamental Rights of the European Union and in light of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities. There-fore, the Federal Labour Court has referred the question to the European Court of Justice in the context of a reference for a preliminary ruling as to whether the Directive permits the justification of direct discrimination on grounds of age in a situation such as that in the main proceedings.
Federal Social Court		

Social Security Obligations of Minority Shareholder-Managers	01.02.2022 - B 12 KR 37/19 R - - B 12 R 19/19 R - - B 12 R 20/19 R -	**Managing directors of a GmbH only exercise an independent activity if, on the basis of their position as shareholders, they have the legal power to exert a significant influence on company resolutions and thus have a comprehensive say in the fate of the company. Minority shareholders only have such legal power if the partnership agreement grants them a blocking minority covering all the company's activities.** Facts In three similar cases before the Federal Social Court, it was disputed whether minority shareholder managing directors of a GmbH are subject to social security contributions. In all three proceedings, the defendant DRV Bund determined that the managing directors were subject to social security contributions. The actions brought against this determination were successful in some cases and unsuccessful in others before the respective lower courts dealing with the issue. Two of the state social courts shared the view of the DRV Bund and assumed a social insurance obligation. This was essentially justified by the fact that the managing directors concerned had no legal power to avert unwelcome shareholder resolutions according to the structure of the partnership agreements. There was no comprehensive blocking minority, so that employment subject to social security contributions had to be assumed. Even the fact that the managing directors concerned were granted a special right to manage the company on their own in these proceedings did not change this. The plaintiff managing directors have appealed against these decisions. Both managing directors are of the opinion that the special right to manage the company granted in each case has an even stronger effect than a blocking minority. The special right does indeed make it possible to oppose instructions by simply disregarding them.

		In the proceedings Ref.: B 12 R 19/19 R, the lower courts ruled in favour of the plaintiff managing director and thus rejected a social insurance obligation. The decision was mainly based on the fact that the plaintiff had a qualified blocking minority. She had been able to effectively defend herself against changes to the company based on the 76% majority required under the articles of association and to effectively prevent instructions being issued to her as managing director. In particular, her dismissal was not possible without her consent. The defendant DRV Bund contests this in its appeal. It is of the opinion that the plaintiff managing director did not have an all-encompassing blocking minority. According to the managing director's contract, she was subject to a consent requirement in a very significant number of cases. The decision of the Federal Social Court In all three proceedings, the Federal Social Court classified the respective minority shareholder managing directors as dependent employees and thus subject to social security contributions. A self-employed activity can only be assumed if the managing director, due to his position as a shareholder, has the legal power to exert a decisive influence on shareholder decisions. A majority requirement of 75% or 76% limited to certain resolutions is not sufficient. Even a special right granted to the managing director does not confer such a power by virtue of which the managing director can influence all shareholder decisions and thus the entire corporate policy. A revocation of the position of managing director limited to important reasons or a waiver by the supervisory board of "shareholders' instructions" also does not constitute a legal power.
European Court of Justice		

Protection against dismissal for severely disabled persons **Reference for a preliminary ruling from the Conseil d'État (Belgium)**	10.02.2022 - C-458/20 -	**An employee with a disability who is declared unsuitable to perform the essential functions of his or her previous job may be entitled to be used in another job for which he or she has the necessary competence, ability and availability. This applies even if the employee is in the probationary period.** *However, such a measure must not place a disproportionate burden on the employer.* Facts The defendant employer in the main proceedings had terminated a railroad worker during the probationary period. The dismissed employee had previously been fitted with a pacemaker, for which reason he was recognized as having a severe disability. As a result, he was no longer able to work as a track worker and was initially employed as a warehouse clerk. One month later, he was dismissed because, according to the employer, it was completely impossible for him to perform the tasks for which he had been hired. The employee then applied to the Conseil d'État (Council of State) to annul the decision to dismiss him. The Council of State asked the Court of Justice for clarifications on the interpretation of Directive 2000/78/EC, in particular on the concept of "reasonable accommodation for persons with disabilities". The decision of the European Court of Justice The European Court of Justice has ruled that the term "reasonable accommodation for persons with disabilities" implies that an employee who has been declared unfit to perform the essential functions of his or her previous job because of his or her disability must be reassigned to another job for which he or she has the necessary competence, ability and availability. An exception is to apply if the employer is disproportionately burdened by this measure. This principle also applies to employees in the probationary period.

		The European Court of Justice has clarified that employees in the probationary period are not excluded from the scope of the Equal Treatment Framework Directive 2000/78/EC. According to the directive, "reasonable accommodation" must be provided to ensure the application of the principle of equal treatment to people with disabilities. According to the Court, within the framework of "reasonable accommodation," it may constitute an appropriate measure to reassign a worker who has become definitively unsuitable for his or her job because of the development of a disability to another job. However, the Equal Treatment Framework Directive could not oblige the employer to take measures that would impose a "disproportionate burden" on him. In particular, the financial cost associated with the measures, as well as the size, financial resources and overall turnover of the organization or company and the availability of public funding or other support, are relevant. In any case, according to the European Court of Justice, the possibility of using a person with a disability in another job presupposes that there is at least one vacant position that the employee in question can take. Effects on German labour law The ruling of the European Court of Justice could make it more difficult to dismiss severely disabled employees during their probationary period. In order to avoid risking the invalidity of the probationary period dismissal, employers should in future check with employees with severe disabilities whether employment in another vacant job is a possibility. It remains to be seen how the German labour courts will deal with the Court's ruling.

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		
Payment of an employer's contribution to a company pension scheme	08.03.2022 - 3 AZR 361/21 -	The Federal Labour Court has to decide whether the plaintiff can demand from the defendant an additional employer contribution to his company pension scheme The collective bargaining agreement relevant to the employment relationship provides that the employer pays its employees a "basic pension amount" for deferred compensation as part of the company pension scheme. In January 2019, the parties concluded a company pension agreement under which the plaintiff pays a more detailed monthly amount into a pension fund by way of deferred compensation. The payment amount includes a basic pension amount. The plaintiff assumes that the defendant is obliged to pay him an additional allowance amounting to 15 percent of the remuneration converted in excess of the basic pension amount. In contrast, the defendant argued that the collective agreement conclusively regulated the conversion of remuneration. In any case, under the transitional provision of Section 26a of the German Occupational Pensions Act (BetrAVG), no subsidy is currently payable under Section 1a (1a) of the Act. The lower courts were of the opinion that the plaintiff was not entitled to the subsidy claimed. The Regional Labour Court based its decision on the fact that the basic pension amount under the collective agreement must in any case be offset against the employer's allowance. Since the amount paid exceeded the amount

		of the statutory allowance, the plaintiff's possible claim was in any case satisfied. The plaintiff contests this in his appeal.
Effectiveness of a Works Council Election with Written Ballot	16.03.2022 - 7 ABR 29/20 -	In dispute is whether a written ballot decided by the election committee for some parts of the plant results in the ineffectiveness of the works council election carried out. The employer manufactures commercial vehicles in its plant on a fenced-in plant site covering several hectares. Immediately outside the factory fence there are further operating sites. In addition, the employer maintains other operating facilities that are located several miles away from the plant site. In the works council election held at the plant in April 2018, the election committee had decided to hold a written ballot for all operating sites outside the fenced plant premises. Nine employees entitled to vote contested the election. The lower courts ruled in favour of the plaintiff employees. The works council election was invalid because the requirements for ordering written ballots for the employees working outside the fenced plant premises were not met. Sec. 24 (3) of the Election Regulations to the Works Council Constitution Act (BetrVG) permits a written ballot for employees in parts of the plant or in micro-enterprises, which are located far away from the main plant. This was not the case here. The election result could have been different according to the voting ratios if 20 voters that are more eligible had taken part in the election. This, in turn, could not be ruled out if no written ballot had been decided. It could not be assumed that all employees in the plants located outside the fenced-in plant premises would have known that they could have cast their vote in person despite the decision to hold a postal vote. The works council and the employer are appealing against these decisions.
European Court of Justice		

"Temporary" lease of employees? **Reference for a preliminary ruling by the LAG Berlin-Brandenburg**	17.03.2022 - C-232/20 -	The European Court of Justice has to rule on the conditions under which the assignment of a temporary worker is to be regarded as "temporary". The plaintiff in the main proceedings was employed as a temporary worker at Daimler AG from September 1, 2014 until May 31, 2019, with 18 extensions. In the process, he was always deployed in the same, permanently existing job without the need for a replacement. Various relevant collective bargaining agreements and general works agreements authorized by them initially permitted the temporary assignments. Later, use was made of the new collective agreement opening clause introduced in 2017 (Section 1 (1b) AÜG), which allows the parties to the collective agreement to provide for a maximum assignment period other than 18 months. The plaintiff sought a declaration before the Berlin-Brandenburg Higher Labour Court that an employment relationship had come into existence between him and the defendant hirer. The defendant countered that the transfer had complied with the requirements of national law. The LAG Berlin Brandenburg referred the following questions to the European Court of Justice for a preliminary ruling: 1. Is the transfer of a temporary worker to a user undertaking no longer to be regarded as 'temporary' within the meaning of Article 1 of the Temporary Agency Work Directive if the employment takes place in a job which is available on a permanent basis and which is not filled on a substitute basis? 2. Is the posting of a temporary worker for a period of less than 55 months to be regarded as no longer 'temporary' within the meaning of Article 1 of the Temporary Agency Work Directive? 3. If the answers to questions 1 and/or 2 are in the affirmative, the following additional questions arise:

		a) Is there a right for the temporary worker to establish an employment relationship with the user undertaking, even if national law does not provide for such a sanction before 1 April 2017? b) Does a national provision such as Sec. 19 (2) of the Law on the Temporary Employment of Workers (AÜG) infringe Article 1 of the Temporary Agency Workers Directive if it prescribes a maximum individual assignment period of 18 months for the first time from 1 April 2017, but expressly disregards previous periods of assignment if, if the previous periods were taken into account, the assignment would have to be qualified as no longer temporary? c) Can the extension of the individual maximum period of temporary employment be left to the parties to the collective agreement? If this is the case: Does this also apply to collective bargaining parties that are not responsible for the employment relationship of the temporary worker concerned but for the sector of the user company?

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
Minimum wage in nursing and vacation days increase	08.02.2022	On February 5, the Care Commission unanimously agreed on higher minimum wages for employees in elderly care: • From September 1, 2022, minimum wages for care workers in Germany are to rise in three steps. Depending on the qualifications of the respective care worker, the minimum care wage is to be raised in three steps to EUR 14.15, EUR 15.25 and EUR 18.25 per hour, respectively. • In addition, the Care Commission recommends an entitlement to additional paid leave over and above the statutory leave entitlement. Based on a 5-day week, care workers should receive 7 days of additional vacation in 2022, and 9 days of additional vacation for each of the years 2023 and 2024.
Draft law on the extension of special regulations in connection with the COVID-19 pandemic for short-time allowances and other benefits	18.02.2022	The "Bundestag" has passed the bill to extend special provisions related to the COVID-19 pandemic in short-time benefits and other benefits. Regulations in detail: • The maximum period of receipt of short-time allowance will be extended to up to 28 months, until June 30, 2022 at the latest. • The simplifications for the receipt of short-time allowance (lowering of the minimum requirements for the granting of short-time allowance and waiver of the build-up of negative working time balances to avoid short-time work) as well as the increased benefit rates for short-time allowance in the case of longer periods of short-time work by employees and the exemption from counting income from marginal

		employment in accordance with Sec. 8 (1) No. 1 of the German Social Code (SGB IV) taken up during short-time work will be extended for the same period. • The provisions of the Nursing Care Leave Act and the Family Care Leave Act, which are necessary to protect public health and improve the compatibility of nursing care and work, are also to apply beyond March 31, 2022 until June 30, 2022.
Home office obligation and "3G" in the workplace to end on March 20, 2022	16.02.2022	The federal and state governments have agreed to scale back the far-reaching Corona measures in controlled steps: • From March 20, 2022, the mandatory home office requirement under the Infection Protection Act is to be dropped if the situation in hospitals permits. • The 3G rule currently in force in the workplace has also been limited until March 19, 2022. As things stand at present, there are no plans to extend it.
Draft Act on Increasing the Protection Provided by the Statutory Minimum Wage and on Changes in the Area of Marginal Employment	23.02.2022	The German Cabinet has approved a draft bill to increase the protection afforded by the statutory minimum wage and to make changes in the area of marginal employment. The bill provides as follows: • The statutory minimum wage will be raised to €12 on October 1, 2022. • The pay limit for mini-jobs will be raised to €520 and made dynamic, so that in future a weekly working time of 10 hours will be possible at the minimum wage. • At the same time, measures will be taken to encourage people to take up employment under social security law and to prevent mini-jobs from being misused as a substitute for regular employment. To this end, law will regulate the possibility of a permissible unpredictable exceeding of the remuneration limit for a low-paid job. • The remuneration limit for midijobs will be raised to €1,600. • In addition, employees in the lower transitional range will receive even greater relief in order to smooth out the jump in the burden at the low-income threshold upon transition to employment subject to social

		insurance contributions and thus increase the incentives for low-income employees to expand their working hours beyond a mini-job. To this end, the employer's contribution above the marginal employment threshold is initially adjusted to the flat-rate contributions of 28 percent payable for a mini-job and then gradually reduced to the regular social security contribution. As a result, the regulations of the draft bill, which provided for the obligation to **record working hours** for marginally employed persons as well as for employees in various sectors, were not included in the government bill. Instead, the cabinet meeting agreed that the Federal Ministry of Labour and Social Affairs and the Federal Ministry of Finance will examine how electronic and tamper-proof working time records can further improve enforcement of the minimum wage without placing an excessive burden on small and medium-sized enterprises in particular by requiring them to purchase time recording systems or digital time recording applications. The development of a digital time recording application that can be made available to employers free of charge is to be examined.

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