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YOUR BUSINESS LAW FIRM

Employment Tracker

JUNE 2022

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 practice
Federal Labour Court		
Entitlement to company pension adjustment	03.05.2022 - 3 AZR 374/21 -	**If the company pension scheme is implemented via a pension fund within the meaning of Sec. 1b (3) of the German Occupational Pensions Act (BetrAVG) and if the pension fund rules ensure that all surpluses attributable to the pension portfolio are used to increase current benefits from the start of the pension, Sec. 16 (3) no. 2 BetrAVG eliminates the obligation of the employer providing the pension to review and decide on adjustments in accordance with Sec. 16 (1) and (2) BetrAVG.** **The applicability of the amendment, which came into force on December 31, 2015, to adjustment periods prior to January 1, 2016, as stipulated by Sec. 30c (1a) BetrAVG, does not constitute a constitutionally impermissible retroactive effect.** *This was decided by the 3rd Senate of the Federal Labour Court.* Facts The plaintiff sought an increase in his company pension before the Federal Labour Court. He has been receiving company pension benefits since 2006. The defendant employer provides these through a regulated pension fund, which is supervised by the German Federal Financial Supervisory Authority (BaFin). The plaintiff's company pension has not been increased since 2009 because the members' meeting of the pension fund decided each year - with the approval of BaFin - to use the

entire surplus for the loss reserve. For this reason, no funds were available for adjusting the company pension.

In his action, the plaintiff is accordingly claiming an increase in his company pension. The defendant is of the opinion that it is exempt from the adjustment review obligation (Sec. 16 (1) BetrAVG) due to the special provision of Sec. 16 (3) No. 2 of the German Occupational Pensions Act (BetrAVG). According to this provision, the adjustment review obligation does not apply if a pension fund uses all surplus shares attributable to the pension portfolio to increase current benefits from the start of the pension.

The plaintiff is of the opinion that the defendant cannot rely on this provision because it is not applicable to the cut-off date at issue in 2012. The transitional provision to the contrary in Sec. 30c (1a) BetrAVG is unconstitutional. In any case, the requirements of the exception were not met.

The decision of the Federal Labour Court

The plaintiff's appeal to the Federal Labour Court was unsuccessful.

The Federal Labour Court ruled that the requirements of Sec. 16 (3) No. 2 of the German Occupational Pensions Act (BetrAVG) had been met and that the defendant was therefore no longer obliged to review the adjustment.

In particular, the new version of Sec. 16 (3) No. 2 BetrAVG does not violate the prohibition of deterioration under Article 7 (2) of the Mobility Directive. The prohibition of deterioration was intended to prevent the transposition of the directive into national law from being used to reduce existing protection. In the present case, the legislator merely corrected, at the same time as and on the occasion of the transposition, a case law of the Senate that existed outside the scope of the directive.

Nor did the Federal Labour Court follow the plaintiff's argument that the transitional provision of Sec. 30c (1a) BetrAVG was unconstitutional. The provision does not violate the prohibition of retroactivity. On the contrary, the defendant's company pensioners should have originally assumed that an adjustment review obligation would not remain unchanged.

Overtime compensation

Burden of proof and presentation in overtime litigation

04.05.2022

- 5 AZR 359/21 -

The principles developed by the Federal Labour Court on the distribution of the burden of proof and presentation of evidence for the performance of overtime by the employee and its initiation by the employer are not changed by the obligation based on Union law to introduce a system for measuring the daily working time worked by the employee.

This was decided by the 5th Senate of the Federal Labour Court.

Facts

The Federal Labour Court had to decide whether the plaintiff is entitled to overtime pay. In this context, the focus was in particular on the question of whether the principles of the Federal Labour Court on the burden of presentation and proof in overtime proceedings have changed because of the time recording ruling of the European Court of Justice in the CCOO case.

The plaintiff worked for the defendant as a delivery driver. His working hours were recorded using a technical working time recording system. The plaintiff and other drivers were not able to register any breaks in the system. Accordingly, the plaintiff's working time account showed corresponding positive hours, which he is now demanding to be remunerated.

According to the plaintiff, he had always worked continuously and had not taken any breaks. He had not been instructed to do so. Rather, the nature of the work was such that breaks were not possible.

The defendant, on the other hand, is of the opinion that the plaintiff did not work overtime. He was instructed to take breaks and did take them. The technical record does not document his working time in a decisive manner. The burden of presentation and proof in the overtime proceedings lies with the plaintiff despite the judgment of the European Court of Justice of May 14, 2019 (- C 55/18 - [CCOO]).

The decision of the Federal Labour Court

The Federal Labour Court has ruled that the requirement for the employee to demonstrate that the employer has caused and attributed overtime cannot be waived, even against the

		background of the aforementioned decision of the ECJ. The judgment of the European Court of Justice on the recording of working time was issued with regard to the Working Time Directive and Article 31 of the Charter of Fundamental Rights of the European Union and therefore had no effect on questions of remuneration. Accordingly, the principles on the distribution of the burden of presentation and proof in overtime compensation proceedings would continue to apply. The plaintiff had not shown in a sufficiently concrete manner that it had been necessary to work through without break times in order to complete the delivery trips. A mere blanket assertion without a more detailed description of the scope is not sufficient for this. You can find more information on the ruling of the Federal Labour Court in our Legal Update (only available in German).
Mass dismissal notification **Absence of the so-called target information**	19.05.2022 - 2 AZR 467/21 -	**The absence of the so-called target information pursuant to Section 17 (3) sentence 5 of the German Dismissals Protection Act (Kündigungsschutzgesetz - KSchG) does not in itself lead to the invalidity of a mass dismissal notification by the employer to the Employment Agency.** *This was decided by the 2nd Senate of the Federal Labour Court.* Facts In dispute was whether the absence of the so-called target information pursuant to Sec. 17 (3) sentence 5 of the German Unfair Dismissals Act (KSchG) led to the invalidity of an ordinary termination for operational reasons. The defendant terminated 17 employment relationships within one month. The mass dismissal was reported to the competent employment agency, but without the information required under Sec. 17 (3) sentence 5 KSchG.

In her action, the plaintiff asserted, among other things, the invalidity of her termination pursuant to Sec. 134 of the German Civil Code (BGB) because the mass dismissal notification was defective due to the absence of the information pursuant to Sec. 17 (3) sentence 5 KSchG.

The lower courts held that the defendant's mass dismissal notice was invalid and upheld the action for protection against dismissal for this reason.

The decision of the Federal Labour Court

The Federal Labour Court has ruled that the lack of information pursuant to Sec. 17 (3) sentence 5 KSchG does not lead to the invalidity (Sec. 134 BGB) of the notice of termination at issue. According to the clear intention of the legislator, a violation of the latter provision does not lead to the invalidity of the mass dismissal notice. The national courts may not disregard this legislative decision by way of an interpretation in conformity with the directive.

Such an interpretation is also not required. The case law of the European Court of Justice has clarified that the information provided for in Sec. 17 (3) KSchG does not have to be included in the notice pursuant to Article 3 (1) subparagraph 4 of the Mass Dismissals Directive.

You can find more details on the ruling of the Federal Labour Court in our Legal Update (only available in German).

European Court of Justice		
Vacation compensation for Temporary workers	12.05.2022 - C-426/20 -	**The compensation paid to temporary workers for unused paid annual leave and the corresponding vacation allowance must be at least equal to what they would have received if they had been hired directly by the user company for the same job and for the same duration of employment.** *This is what the European Court of Justice has ruled.*

Facts

In the main proceedings in Portugal, two temporary workers are claiming payment of vacation compensation against the temporary employment agency.

The temporary workers had been assigned to another company for two years. They are of the opinion that the paid annual leave and the corresponding vacation pay should be based on the general regulation for paid annual leave.

The defendant in the main proceedings, on the other hand, is of the opinion that the special regulation for paid vacation applicable to temporary workers is decisive in this respect. Accordingly, the employees would be entitled to less paid vacation and vacation pay than if they had been hired directly by the user company.

The competent labour court in Portugal wondered whether this special regulation was compatible with the Temporary Agency Workers Directive and accordingly asked the European Court of Justice to clarify the issue in a preliminary ruling procedure.

The decision of the European Court of Justice

The European Court of Justice has ruled that the Temporary Agency Work Directive precludes national legislation under which the compensation for unused paid annual leave and the corresponding vacation pay to which temporary agency workers are entitled on termination of their employment relationship with a user undertaking is less than the compensation to which they would be entitled in such a situation for the same reason if they had been recruited directly by the user undertaking for the same job and for the same duration of employment.

According to the directive, temporary workers must be subject, for the duration of their posting to a user undertaking, to at least the same basic working and employment conditions as those to which they would be subject if they had been recruited directly by the undertaking concerned.

Whether this principle is complied with must be examined by the national court, according to the European Court of Justice.

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 practice
Federal Labour Court		
Acceptance delay compensation **Obligation to participate in corona tests**	01.06.2022 - 5 AZR 28/22 -	The Federal Labour Court decides whether the plaintiff is entitled to compensation for default of acceptance. In this context, the question to be clarified is in particular whether the plaintiff was obliged to be tested for an infection with the SARS-CoV-2 virus. The plaintiff, who was employed as a flautist at the Bavarian State Opera, refused to submit a Corona test, contrary to the hygiene concept of the defendant in force during the Corona pandemic. The hygiene concept stipulated that all employees had to present a negative PCR test when they started work; otherwise, participation in rehearsals and performances was not possible. The testing was organized by the State Opera and carried out free of charge. Since the plaintiff refused to submit a test, she was neither employed nor paid during this time. The plaintiff is now suing for the unpaid compensation. The plaintiff is also seeking employment without being required to submit a test. She is of the opinion that there is no legal basis for random general PCR tests. In addition, the tests do not offer any security, are therefore unsuitable and therefore disproportionate. The defendant, on the other hand, is of the opinion that the ordering of tests falls under Sec. 4 Para. 2 of the applicable collective agreement for musicians in cultural orchestras (TVK). The order is also proportionate.

		The courts that had previously dealt with the matter ruled in favour of the defendant and dismissed the action accordingly. Sec. 4 Par. 2 TVK covered the order for regular corona tests. The employer was obligated to protect the other employees from infection under Sec. 618, Subsection 1 BGB. The tests were both suitable for this purpose and, in any case, necessary in the orchestra, especially since the plaintiff, as a flautist, could not wear a mask. The interference with physical integrity and general personal rights associated with the tests was relatively minor and justified by the health protection of colleagues and the employer's interest in maintaining rehearsals and performances. Accordingly, the plaintiff was not entitled to compensation for default of acceptance. In her appeal to the Federal Labour Court, the plaintiff continues to pursue her claim for back pay.
Effectiveness of a fixed-term contract due to planned takeover of trainees	01.06.2022 - 7 AZR 241/21 -	The Federal Labour Court has to decide on the legal validity of a fixed-term contract and, in this context, on whether the employment of trainees is to be recognized as a material reason. The plaintiff was employed by the defendant as a clerk on the basis of several employment contracts, each with a fixed term. The last employment contract was also limited until July 31, 2018. The planned takeover of trainees was stated as the reason. The plaintiff's previous position has been occupied by a former trainee since August 1, 2018. In her action, the plaintiff is contesting the termination of her employment relationship. The plaintiff is of the opinion that the fixed term is invalid because there is no objective reason. The defendant, on the other hand, is of the opinion that taking on trainees is an unwritten factual reason within the meaning of Sec. 14 (1) Sentence 1 Part-Time and Fixed-term Employment Act (TzBfG). In particular, the required causal connection between the fixed-term employment of the employees and the intended takeover of several trainees is already given if the number of employees who are employed on a fixed-term basis for this reason does not exceed the number of trainees who are expected to be taken over.

		The lower courts found in favor of the defendant and accordingly dismissed the action. The main reason given was that the intended occupation of a job by a trainee after completion of the training constituted another factual reason for the limitation of an employment contract pursuant to Section 14 (1) sentence 1 TzBfG which is not mentioned in Sec. 14 (1) sentence 2 No. 1-8 TzBfG. The taking on of trainees complies with the valuation standards expressed in Sec. 14 (1) TzBfG and is equivalent in terms of its weight to the factual reasons stated in Sec. 14 (1) sentence 2 nos. 1-8 TzBfG. It was not necessary to assign the fixed-term employee to a specific trainee by name. The required causal connection also existed. If the employment relationships of several employees are limited in time due to the intended takeover of several trainees, the required causal connection exists if the number of employees whom the employer employs on a fixed-term basis with a view to taking over the trainees does not exceed the number of trainees whose takeover is to be expected. The plaintiff contests this in its appeal to the Federal Labour Court.
Compensation pursuant to Sec. 15 (2) of the General Equal Treatment Act (AGG) due to discrimination on the grounds of (severe) disability	02.06.2022 - 8 AZR 191/21 -	In dispute is whether the plaintiff has a claim for compensation according to Sec. 15 para. 2 AGG because of discrimination due to his severe disability. The plaintiff was employed as a janitor by the defendant and was employed at an elementary school there based on a contract between the defendant and Lutherstadt Wittenberg. The defendant terminated the plaintiff's employment. Several months after the expiration of the notice period, the plaintiff was initially temporarily recognized as a severely disabled person. The plaintiff claims that he suffered a stroke before the notice of termination was issued, which was also communicated to the defendant the day after the stroke. He therefore considers himself to be discriminated against by the dismissal on the grounds of his severe disability and demands compensation in accordance with Sec. 15 (2) AGG. The lower courts are of the opinion that no sufficient indications (Sec. 22 AGG) were present, which let a disadvantage of the plaintiff because of the handicap assume. Accordingly, the action was dismissed. Even if one were to assume in favour of the plaintiff that there were sufficient indications of unlawful discrimination, the defendant had in any case rebutted

		any presumption. By terminating the contractual relationship with Lutherstadt Wittenberg, the defendant had proven a comprehensible other motive for the termination. The plaintiff contests this in its appeal.
Cancellation of Recruitments and Transfers Due to Failure to Involve the Works Council Pursuant to Section 99 of the Works Council Constitution Act (BetrVG)	14.06.2022 - 1 ABR 8/21 -	In dispute is whether several transfers and recruitments which are specified in more detail are to be cancelled pursuant to Sec. 101 BetrVG because the works council was not involved pursuant to Sec. 99 BetrVG. In particular, it is questionable in this context whether the spin-off of branches from one establishment and their integration into two other establishments constitutes a personnel measure pursuant to Sec. 99 BetrVG. The employer operates numerous cafés in Berlin. The employer planned the restructuring of these establishments. Accordingly, several branches were to be assigned to other establishments. Two branches were to be assigned to another, already existing business, and two other branches were to be assigned to a newly founded business. The relevant works council was not involved in the process. The works council is therefore requesting the cancellation of the appointments and transfers of various employees. In the opinion of the works council, the assignment of the branches to another company has the effect of discontinuing the employment of the employees working there. The change to a different structure under works constitution law alone justifies the works council's obligation to participate pursuant to Sec. 99 (1) BetrVG. The same applies to the transfer of employees by assigning the branches to the newly formed company. The employer is of the opinion that due to the lack of personnel measures and the lack of assignment of a different work area, there is neither a transfer nor a hiring of the employees concerned. The employees concerned had not been assigned a new workplace. Rather, the change of the work area was merely an automatic consequence of the corporate decision. The Labour Court rejected the motions of the works council, while the Berlin-Brandenburg Higher Labour Court (LAG) granted them. The LAG is of the opinion that the assignment of a branch of a company to another company of the employer is an individual personnel measure for the employees working in the branch which requires the involvement of the

	works council in accordance with § 99 BetrVG. This also applies if, apart from the assignment to the other business, there is no change in the activity. In the case of the assignment of the branches with the workplaces there and the employees working there to another business, the operational environment changed to such an extent that it was a transfer within the meaning of Sec. 95 (3) BetrVG.

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
Corona occupational health and safety ordinance will not be extended	20.05.2022	According to a press release of the Federal Ministry of Labour and Social Affairs (BMAS), there is no reason to extend the SARS-CoV-2 Occupational Health and Safety Regulation beyond May 25, 2022, in view of the encouraging and steady decline in infection figures. Since regional outbreaks of infection in companies cannot be ruled out after this date, employers are called upon to continue to monitor the incidence of infection and, if necessary, to adapt the company hygiene concept to the incidence of infection. On May 27, 2022, the BMAS published recommendations on this in the form of answers to frequently asked questions (FAQs), which provide guidance and advice to company stakeholders on how to prevent and contain company outbreaks. These recommendations focus on those infection control measures that have proven particularly effective during the pandemic. The recommendations can be found here.

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