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YOUR BUSINESS LAW FIRM

Employment Tracker

JULY 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		
Acceptance delay compensation **Obligation to participate in corona tests**	01.06.2022 - 5 AZR 28/22 -	**In order to implement its obligations under occupational health and safety law, the employer may be entitled to unilaterally order corona tests based on a company protection and hygiene concept.** *This was decided by the 5th Senate of the Federal Labour Court.* Facts The Federal Labour Court had to decide whether the plaintiff was 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 was also proportionate.

The decision of the Federal Labour Court

The appeal filed by the employee was unsuccessful. In its reasoning, the Federal Labour Court essentially stated that Sec. 618 (1) of the German Civil Code obligates the employer to protect its employees against dangers to life and health. The duty of care set out in Sec. 618 (1) of the German Civil Code is concretized by the public-law occupational health and safety standards of the Occupational Health and Safety Act. The employer can enforce the occupational safety measures by means of instructions.

On this basis, the instruction of the defendant Free State to carry out PCR tests in accordance with the operational hygiene concept of the Bavarian State Opera was lawful. In order to meet the requirements of the Sixth Bavarian Infection Protection Measures Ordinance, a hygiene concept was developed with scientific support. The regular performance of PCR tests was intended to enable the opera to continue and to protect the health of the employees. In the opinion of the Federal Labour Court, the instructions to the plaintiff based on this concept were in line with reasonable discretion. The interference with the physical integrity associated with the performance of the tests was also proportionate.

Against this background, there was no claim to compensation for default of acceptance. Since the plaintiff had refused to carry out the Corona tests, the plaintiff lacked the will to perform required for default of acceptance.

Compensation according to Sec. 15 para. 2 of the German General Equal Treatment Act (AGG) due to	02.06.2022 - 8 AZR 191/21 -	**The employer's violation of regulations containing procedural and/or promotional obligations in favour of severely disabled persons can justify the presumption - which can be refuted by the employer - within the meaning of Sec. 22 AGG that the disadvantage experienced by the severely disabled person occurred because of the severe disability. These provisions include Section 168 SGB IX, according to which**

discrimination because of (severe) disability

Dismissal without prior consent of the integration office

the termination of the employment relationship of a severely disabled person by the employer requires the prior consent of the Integration Office.

This was decided by the 8th Senate of the Federal Labour Court.

Facts

In dispute was whether the plaintiff has a claim for compensation according to § 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 discriminated against by the dismissal on the grounds of his severe disability and demands compensation in accordance with Sec. 15 (2) AGG.

The decision of the Federal Labour Court

The Federal Labour Court decided that the plaintiff has no claim against the defendant for payment of compensation according to Sec. 15 Abs. 2 AGG.

For the reasoning, the 8th senate of the Federal Labour Court essentially states that the plaintiff had not shown that the disadvantage occurred because of his (severe) disability. Admittedly, the offence of the employer against Sec. 168 SGB IX could justify in individual cases the refutable presumption in the sense of Sec. 22 AGG that the heavy handicap was (joint) causal for the disadvantage. However, the plaintiff had not conclusively demonstrated a violation of this provision by the defendant. Even if it were true that the plaintiff had suffered a stroke, there were no circumstances according to which the defendant could assume an obvious severe disability at the time of the termination.

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		
Compensation for vacation **Effectiveness of a preclusive period agreed in an individual contract**	05.07.2022 - 9 AZR 341/21 -	In dispute is whether a possible claim of the plaintiff to compensation for vacation has lapsed due to non-observance of the preclusive period agreed in the employment contract. The plaintiff employee terminated her employment relationship with the defendant while she was on parental leave and at the same time applied for her remaining leave. After termination of the employment relationship, the plaintiff claimed leave entitlements for maternity leave periods in 2013 and 2014. The defendant is of the opinion that this leave was forfeited due to a preclusive period agreed in individual contracts. The employment contract concluded between the parties contains a clause according to which mutual claims arising from the employment relationship and those connected with the employment relationship expire if they are not asserted within 3 months of becoming due. In her action, the plaintiff is seeking payment in lieu of leave in accordance with Sec. 17 (4) BEEG in conjunction with Sec. 17 (1) BEEG. She is of the opinion that the defendant has not issued a reduction declaration to her. The defendant cannot rely on the preclusion period contained in the employment contract, since the employer is obligated to inform the employee specifically and in complete transparency about the amount of the vacation leave. The employer must also request the employee to take this leave. In contrast, the defendant is of the opinion that it declared the reduction and invoked the time limit for termination. The employee could not rely on the case law of the Federal Labour

		Court on the employer's duty to inform about the existing leave and the taking of leave, since there was no longer any interest in recuperation for health protection at the end of the employment relationship. The lower courts partially upheld the plaintiff's claim, but otherwise dismissed it. The reason given was essentially that the claims to compensation for vacation had lapsed due to the preclusion period. As a purely pecuniary claim, an employee's claim to vacation pay could also be subject to preclusion periods. Neither the indispensable protection of the statutory minimum vacation pursuant to Sections 1, 3 (1), 13 (1) sentence 1 BUrlG nor the interpretation of Directive 2003/88/EC made by the European Court of Justice preclude this. With her appeal to the Federal Labour Court, the plaintiff would like to achieve that she is awarded the full claim for vacation compensation asserted.
Effectiveness of a waiting period termination upon leaving the Catholic Church	21.07.2022 - 2 AZR 130/21 -	The Federal Labour Court has to decide on the validity of a notice of termination for a qualifying period, which was given because the plaintiff had left the Catholic Church. The plaintiff worked as a midwife for the defendant, a hospital of the German Caritas Association. Before being hired, the plaintiff filled out a personnel questionnaire in which she stated that she had left the Catholic Church. The employment contract referred to the "Guidelines for Employment Contracts in the Facilities of the German Caritas Association" (AVR). These stipulate, among other things, that persons who have left the Catholic Church are not suitable for service in the church. After the plaintiff began work, it became apparent upon reviewing the documents that she had left the Catholic Church. After several discussions about the motives for leaving the church and the plaintiff's refusal to re-join the church, the defendant terminated the employment relationship. In the action brought against the termination, the plaintiff argued that the termination was invalid due to a violation of § 1 AGG. She had only turned away from the Catholic Church because of the abuse of underage children and the lack of criminal prosecution, but fulfilled the expectations placed on non-Catholic Christian employees. The defendant, on the other hand, assumes that the termination cannot be regarded as in breach of trust within the

		meaning of § 242 BGB. Due to her conscious renunciation of the Catholic Church, the plaintiff was not suitable for the job of a midwife in the defendant's hospital. The Labour Court considered the dismissal to be invalid. The Regional Labour Court in Hamm, on the other hand, assumed that the termination was effective. This was essentially justified by the fact that, taking into account the self-image of the Catholic Church, it was a justified professional requirement to make the performance of the work of a midwife dependent on the fact that she had not left the Catholic Church. Accordingly, a notice of termination issued based on leaving the church does not violate Sec. 1, 7 AGG. The plaintiff contests this with her appeal to the Federal Labour Court.
European Court of Justice		
Equal treatment in the case of night work bonuses under collective bargaining agreements **Preliminary ruling attempts of the Federal Labour Court**	07.07.2022 - C-257/21 - - C-258/21 -	The European Court of Justice decides in a reference for a preliminary ruling on the interpretation of Art. 20 and Art. 51 Para. 1 Sentence 1 of the Charter of Fundamental Rights of the European Union as well as on requirements of the Working Time Directive 2003/88/EC. In several main proceedings, the parties dispute the amount of the collectively agreed bonuses for hours worked in night shifts. The respective plaintiffs in the main proceedings perform night work as part of shift work at the defendant, a company in the beverage industry. The relevant collective agreement provides for lower bonuses for regular night work than for irregular night work. The plaintiffs performed regular night work for several months. They are of the opinion that the much lower bonuses for regular night work compared to the bonuses for irregular night work violate Article 3 (1) of the German Basic Law and the principle of equal treatment under Union law. They therefore demand the differences between the higher bonuses for irregular night work and the bonuses paid for regular night work. The Berlin Labour Court (judgment dated October 16, 2019 - 39 Ca 9996/19 and 39 Ca 9899/19) dismissed the claims. The Berlin-Brandenburg Regional Labour Court (judgment dated June 12, 2020 - 8 Sa 2030/19 and 8 Sa 2029/19) upheld them in part. The Federal

Labour Court has suspended the proceedings and referred the following questions to the European Court of Justice for a preliminary ruling:

1. *Does a collective agreement implement the Working Time Directive 2003/88/EC within the meaning of the first sentence of Article 51(1) of the Charter of Fundamental Rights of the European Union if the collective agreement provides for higher compensation for irregular night work than for regular night work?*

2. *If the answer to Question 1 is in the affirmative:*

   Is a provision of a collective agreement compatible with Article 20 of the Charter of Fundamental Rights of the European Union which provides for higher compensation for irregular night work than for regular night work if, in addition to the health impairments caused by night work, it is also intended to compensate for burdens due to the poorer plannability of irregular night work?

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 rises to 12 euros per hour from October	03.06.2022	On June 3, 2022, the German Bundestag approved the German government's bill to increase the statutory minimum wage to 12 euros per hour. The increase is based on an agreement in the coalition agreement and comes into force on October 1, 2022.
Agreement on a directive for minimum wages in Europe	07.06.2022	The Council and the European Parliament reached preliminary political agreement on a draft directive on adequate minimum wages in the EU. The directive will establish procedures for the adequacy of statutory minimum wages, promote collective bargaining for wage setting, and improve effective access to minimum wage protection for those workers who are entitled to a minimum wage under national law. These are the main provisions of the provisional agreement: ▪ Adequacy of statutory minimum wages: Member States with statutory minimum wages are required to establish a procedural framework for setting and updating these minimum wages according to clear criteria. Statutory minimum wages should be updated at least every two years. ▪ Promote collective bargaining for wage setting: Member States should promote the ability of social partners to engage in collective bargaining. In particular, Member States should establish an action plan to promote collective bargaining in cases where collective bargaining coverage is below a threshold of 80%. ▪ Effective access: The Council and the European Parliament agreed on a number of measures to improve effective access of workers to minimum wage protection. These measures include inspections by supervisory authorities, easily accessible information

		on minimum wage protection, and developing the capacity of enforcement authorities to take action against non-compliant employers.
Draft law on the implementation of the directive on reconciliation of work and private life for parents and family carers (RL (EU) 2019/1158)	09.06.2022 *Government draft*	The German government has published a draft law to further implement the European Compatibility Directive. The regulations at a glance: ▪ Employers who do not comply with a parent's request to reduce or spread their working hours during parental leave will be required to give reasons for their decision. This will make the circumstances that led to the rejection of the request transparent for the parents concerned as well. ▪ Employers in small businesses will be required to respond to employees who request the conclusion of an agreement on a leave of absence under the Caregiver Leave Act or the Family Caregiver Leave Act within a period of four weeks from receipt of the request. If the application is rejected, reasons must be given. ▪ Employees in small companies who agree with their employer on a leave of absence in accordance with the Nursing Care Leave Act or the Family Care Leave Act are – they can terminate the leave prematurely if the close relative no longer requires care or if home care for the close relative is impossible or unreasonable, and – Protection against dismissal is introduced for the duration of the agreed leave of absence. ▪ The Federal Anti-Discrimination Agency under the General Equal Treatment Act is designated to be responsible for issues relating to discrimination covered by Directive (EU) 2019/1158.
Ordinance on the extension of access facilities for the receipt of short-time working allowances	22.06.2022 *Draft bill*	The Short-Time Worker Benefit Access Ordinance, which was approved by the Cabinet on June 22, 2022, extends access relief until the end of September 30, 2022. The ordinance essentially contains the following provisions: ▪ It will continue to be sufficient for companies until September 30, 2022, if at least 10 percent of their employees are affected by the loss of work (regularly at least one-third). ▪ To avoid short-time working, employees will still not have to build up minus hours before receiving short-time allowance.

		▪ Companies that have to report short-time work for the first time on July 1, 2022, or again after an interruption of at least three months, can also benefit from the access relief until the end of September 30, 2022.
German Bundestag approves draft law amending the Evidence Act	23.06.2022	On June 23, 2022, the Bundestag passed the law amending the Verification Act. In doing so, the legislator is implementing the EU Working Conditions Directive. The amendments to the Verification Act not only oblige employers to set down even more extensive contractual terms and conditions in writing at short notice. In the future, employers will be subject to fines in addition to the existing sanctions if they violate the Verification Act. The draft law provides for the following significant changes: The contract content that employers must set down in writing has been significantly expanded. In addition to the information previously required, in the future, for example, the end date of employment in the case of fixed-term employment relationships, the duration of any agreed probationary period and the procedure to be followed by both parties when terminating employment relationships must also be set down in writing. In the future, the Evidence Act will require the evidence to be provided to be in writing. ▪ The dates for the obligation to provide evidence will be brought forward in line with European requirements. The record of some details (such as the name of the contracting parties, the amount of remuneration and the agreed working hours) is to be handed over to the employee on the first day of work performance. ▪ Another innovation is the introduction of an administrative offense. If employers do not properly fulfil their obligations to provide proof, they will be subject to a fine of up to EUR 2,000 in the future. ▪ Other laws will also be amended to implement the Working Conditions Directive. You can find more information on the changes to the Verification Act and a recommended course of action for employers in our Legal Update (only available in German).

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