YOUR BUSINESS LAW FIRM

Employment Tracker

AUGUST 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		
Hardship allowance for wearing a medical face mask **Collective agreement for cleaning services**	20.07.2022 - 10 AZR 41/22 -	**The wearing of a medical facemask (so-called surgical mask) on the instructions of the employer in connection with corona protection measures does not meet the requirements for the hardship supplement pursuant to Sec. 10 No. 1.2 of the Framework Collective Agreement for Commercial Employees in Building Cleaning dated October 31, 2019 (RTV).** *The 10th Senate of the Federal Labour Court decided this.* Facts The Federal Labour Court had to decide whether the plaintiff was entitled to payment of a hardship allowance because he had to wear a medical facemask while working as a cleaner on the instructions of the employer in connection with corona protection measures. The plaintiff is of the opinion that he is therefore entitled to a hardship allowance under the collective bargaining agreement based on Sec. 10 No. 1.2 RTV for 10% of his hourly wage. Wearing a medical facemask is a hardship, which should be compensated by the hardship allowance. A medical facemask is to be considered part of the personal protective equipment because it also reduces the risk of infection. The decision of the Federal Labour Court

		The Federal Labour Court ruled that the plaintiff was not entitled to a severity allowance under the collective bargaining agreement. This was mainly because a medical facemask does not constitute a respiratory protection mask within the meaning of Sec. 10 No. 1.2 RTV. The term "respiratory protection masks" only included masks that were primarily intended for self-protection and belonged to the so-called personal protective equipment. Medical facemasks, on the other hand, are intended to provide protection for others but not for oneself. Accordingly, the requirements for the collectively agreed severity allowance are not met in the case of a medical facemask.
Termination of a midwife for leaving the Catholic Church before the employment relationship was established	21.07.2022 - 2 AZR 130/21 -	**The Federal Labour Court asks the Court of Justice of the European Union to interpret Union law on the question of whether a hospital affiliated with the Catholic Church may consider an employee unsuitable for a job solely because she left the Catholic Church before the employment relationship began, even if it does not otherwise require the employees working for it to belong to the Catholic Church.** <u>Facts</u> The Federal Labour Court had to decide on the validity of a notice of termination for a qualifying period, which was issued 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 Sec. 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 being in breach of trust within the meaning of Sec. 242 BGB. Due to her conscious renunciation of the Catholic Church, the plaintiff is not suitable for the work of a midwife in the defendant's hospital.

The decision of the Federal Labour Court

The Federal Labour Court has stayed the appeal proceedings and referred the following questions to the European Court of Justice for a preliminary ruling:

1. Is it compatible with Union law, in particular Directive 2000/78/EC in the light of Article 21 of the Charter of Fundamental Rights of the European Union (Charter), for a national regulation to provide that a private organisation whose ethos is based on religious principles,

   a. may deem unsuitable for employment in its services persons who have left a particular religious community prior to the establishment of the employment relationship; or

   b. may require persons working for it not to have left a particular religious community prior to the establishment of the employment relationship; or

   c. may make the continuation of the employment relationship dependent on the fact that a person working for it who has left a particular religious community prior to the establishment of the employment relationship re-joins that community,

if it does not otherwise require persons working for it to belong to that religious community?

2. If the answer to the first question is in the affirmative: What, if any, further requirements apply under Directive 2000/78/EC in the light of Article 21 of the Charter to justify such a difference of treatment on grounds of religion?

European Court of Justice

Equal treatment in the case of night work bonuses under collective bargaining agreements

Preliminary ruling of the Federal Labour Court

07.07.2022

- C-257/21 -

- C-258/21 -

A collective bargaining agreement that provides for a higher pay supplement for irregular night work than for regular night work does not implement the Working Time Directive 2003/88/EC within the meaning of Article 51 (1) of the Charter of Fundamental Rights of the European Union.

The European Court of Justice decided this.

Facts

In a preliminary ruling, the European Court of Justice had to decide on the interpretation of Article 20 and Article 51 (1) sentence 1 of the Charter of Fundamental Rights of the European Union and 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 claim the differences between the higher bonuses for irregular night work and the bonuses paid for regular night work.

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?

The Decision of the European Court of Justice

The European Court of Justice has ruled that the employees' remuneration supplement for night work provided for in Section 7 No. 1 of the MTV at issue in the main proceedings does not fall within the scope of Directive 2003/88/EC and, consequently, cannot be regarded as implementing Union law within the meaning of Article 51(1) of the CFR.

The European Court of Justice states that the concept of "implementation of Union law" within the meaning of Article 51 CFR presupposes the existence of a link between a Union act and the national measure in question. However, the Working Time Directive is primarily limited to regulating certain aspects of the organization of working time, so that, in principle, it does not apply to the remuneration of employees. Articles 8 to 13 of the Working Time Directive regulate night work, but not the remuneration of employees for night work.

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		
Default of acceptance compensation: default of acceptance by the employer after the employee's return to travel and submission of a current negative Corona test	10.08.2022 - 5 AZR 154/22 -	The Federal Labour Court has to decide whether a hygiene concept may provide that travellers returning from a risk area have to stay at home for 14 days without wage payment, although the current Corona regulations did not provide for a quarantine for travellers returning from a risk area if they can show a current negative Corona test. The plaintiff employee was on vacation in a high-risk area. He underwent a PCR test before both departure and entry, both of which were negative. He also had a doctor's certificate stating that he had no symptoms that could indicate COVID-19 disease. When the plaintiff wanted to start work as planned after his vacation, he was turned away at the factory gate with reference to the hygiene concept in force at the employer. The hygiene concept stipulated that travellers returning from a risk area must stay at home for 14 days. A one-time PCR test during the return from a risk area would not be accepted. During the quarantine, employees would lose their wage payment entitlements. The defendant also pointed this out by circular letter before the plaintiff took his leave. The Corona rules currently in force, on the other hand, did not provide for a quarantine for travellers returning home if they had a current negative Corona test. Accordingly, the plaintiff demanded payment of default of acceptance compensation for the period of the 14-day quarantine. The lower courts ordered the defendant to pay. The defendant's appeal to the Federal Labour Court is directed against this.

Crediting of periods of ordered quarantine against approved annual leave	16.08.2022 - 9 AZR 76/22 -	At issue is whether the plaintiff is entitled to credit for approved leave days when he was in quarantine during recreational leave due to a risk contact. Because of the plaintiff's contact with a person with confirmed COVID-19 infection, the City ordered him sequestered in domestic quarantine during his employer-approved annual leave. The plaintiff informed the defendant-employer of this and unsuccessfully asked the employer to credit the leave back to his leave account. The plaintiff did not have an infection. With his lawsuit, the plaintiff is seeking the crediting of the eight vacation days falling within the period of the ordered quarantine to his vacation account. He is of the opinion that, just as in the case of illness during vacation, the ordered quarantine prevents his recovery during this time. The defendant is of the opinion that it has fulfilled the plaintiff's vacation entitlement. A corresponding application of Sec. 9 BUrlG to the case of an ordered quarantine during the vacation is out of the question. The provision according to which days of proven incapacity for work during vacation are not counted towards annual vacation is an exceptional provision that cannot be generalized. The Labour Court dismissed the action. The Regional Labour Court upheld it. In its appeal to the Federal Labour Court, the defendant employer wants to ensure that it does not have to credit the vacation days in dispute.
Consideration of restricted stock units in the amount of a waiting allowance	25.08.2022 - 8 AZR 453/21 -	The Federal Labour Court decides whether so-called restricted stock units (RSUs) are to be taken into account in addition to the basic salary when determining the amount of compensation for a waiting period. The defendant employer was obligated to pay compensation for a waiting period based on a post-contractual non-competition clause agreed in the employment contract. The compensation was to be paid for each year of the prohibition for them of the last contractual benefit received by the plaintiff. During the term of the employment relationship, the plaintiff was also granted so-called restricted stock units (RSUs) for common shares of the Group parent company in addition to his basic salary. RSUs are "restricted" stock subscription rights under which the employee receives shares in the Company after a certain vesting or waiting period has expired and

certain conditions have been met. The contractual basis for the granting was an agreement with the Group parent company. The defendant employer took over the settlement of RSUs already transferred.

The agreement with the Group parent company provided that RSUs already granted but not yet vested would be forfeited without replacement upon termination of the employment relationship from the date of release.

The defendant notified the plaintiff of the expected amount of compensation for 2019, which consisted of his base salary and the current share value of the RSUs expected to vest in the calendar year. It pointed out that the RSUs would be provided by the Group parent company and would not be taken into account when calculating compensation for post-contractual non-competition agreements.

On the termination of the employment relationship, the plaintiff concluded a settlement agreement with the defendant, which, in deviation from his agreements with the Group parent company, stipulated that, all RSUs still due in 2019 would be transferred to him despite his release. After leaving the company, the plaintiff complied with the agreed non-competition clause without earning any other income. The defendant paid him compensation for nine months for salary.

In his action, the plaintiff is claiming payment of further compensation for non-competition. He took the view that not only his basic salary but also the RSUs granted by the Group parent company should be taken into account when calculating the compensation for parental leave. The defendant objected that the RSUs granted by the parent company were benefits from a third party and not the contractual benefits received by the plaintiff in return for his work. Therefore, they were irrelevant for the compensation for waiting.

The lower courts took the view that the RSUs were not to be taken into account when calculating the compensation for parental leave and consequently upheld the defendant's claim. The plaintiff contested this in his appeal to the Federal Labour Court.

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 on Increasing the Protection Provided by the Statutory Minimum Wage and on Changes in the Area of Marginal Employment	01.07.2022 *Act announced*	The Act on Increasing the Protection Provided by the Statutory Minimum Wage and on Changes in the Area of Marginal Employment was promulgated on July 1, 2022. The regulations at a glance: ▪ The general statutory minimum wage will be raised once to 12 euros gross per hour worked on October 1, 2022. Following this, the independent Minimum Wage Commission is to decide on any further increase steps - for the first time by June 30, 2023, with effect from January 1, 2024. ▪ The pay threshold for low-paid employment (known as a mini-job) is to be raised to 520 euros as part of the increase in the minimum wage and dynamited to allow for a working week of ten hours. The remuneration limit for employment in the transitional sector (so-called midijob) is to be raised to 1,600 euros and further developed. ▪ In order to increase the incentives to be employed beyond a mini-job, employees in the lower transitional range in particular will be relieved of a greater burden. The marginal burden in the transition to employment subject to social insurance contributions will be smoothed. In addition, the conditions for "occasional unforeseen exceeding" of the marginal earnings threshold will be regulated by law.
Draft Law on the Implementation of the Provisions of the Reorganiza-	06.07.2022 *Government draft*	Recently, the government draft of a law implementing the provisions of the Transformation Directive on employee participation in cross-border transformations, mergers and divisions was published.

tion Directive on Employee Participation in Cross-Border Reorganizations, Mergers and Divisions	Central regulatory elements of the draft law: ▪ In accordance with the requirements of Union law, the MgFSG applies primarily to the structuring of co-determination in companies of German legal form resulting from a cross-border change of legal form or a cross-border demerger ("inward conversion"). ▪ Uniformly for cross-border transformation of legal form, cross-border demerger and merger, negotiations on co-determination in an emerging company are already required if a participating company employs a number of employees which corresponds to at least four fifths of the threshold value which triggers company co-determination in the departing member state ("four-fifths rule"). ▪ The scope for implementation with regard to the election of the employee representatives in the special negotiating body attributable to Germany will be filled according to the model of the existing law. In order to avoid delays and unnecessary costs, the election will be carried out by existing employee representation bodies. The special features of cross-border demergers are taken into account by guaranteeing seats for the employees directly affected. ▪ In the case of a cross-border change of legal form and a cross-border division, participation rights are strictly protected. Following the example of the formation of an SE by conversion, all components of co-determination are protected both in the case of co-determination by virtue of agreement and in the case of the statutory standard rules. ▪ The protection in the case of subsequent conversions is regulated uniformly for cross-border changes of legal form, cross-border demergers and cross-border mergers. The separate provisions for subsequent domestic and subsequent cross-border transformations create legal certainty in the demarcation between the negotiated solution prescribed by EU law and domestic co-determination law.

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