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YOUR BUSINESS LAW FIRM

Employment Tracker

SEPTEMBER 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		
Default of acceptance compensation: default of acceptance by the employer after the employee's return from a travel and submission of a current negative Corona test	10.08.2022 - 5 AZR 154/22 -	**If an employer bans an employee returning from a Corona risk area from entering the company premises for 14 days, even though the employee is not subject to a quarantine obligation in accordance with the statutory requirements upon entry due to the submission of a current negative PCR test and a medical certificate stating that the employee is symptom-free, the employer is generally liable for compensation for default of acceptance.** *The 5th Senate of the Federal Labour Court decided this.* Facts The Federal Labour Court had 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.

The decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the plaintiff and awarded him the claimed compensation for default of acceptance.

The defendant was in default of acceptance; in particular, the ban on entering the premises issued by the defendant had not led to the plaintiff's inability to perform because the cause of the failure to perform the work had been set by the defendant itself. Nor had it shown that it was unreasonable for it to accept the plaintiff's work performance due to the specific operational circumstances.

In the opinion of the Federal Labour Court, the instruction to stay away from the company for a period of 14 days without continued payment of wages was also unreasonable (Sec. 106 GewO) and therefore ineffective. The defendant had not given the plaintiff the opportunity to largely exclude an infection by means of a further PCR test. In this way, the defendant could have achieved the required and appropriate protection of the employees' health according to Sec. 618 (1) of the German Civil Code (Bürgerliches Gesetzbuch - BGB) and ensured proper operations.

Crediting of periods of ordered quarantine against approved annual leave	16.08.2022 - 9 AZR 76/22 (A) -	**The Federal Labour Court asks the European Court of Justice for an interpretation of European Union law on the question of whether granted annual leave must be granted to an employee if he is not incapacitated for work during the leave, but he**

had to comply with an officially ordered domestic quarantine during the recreational leave.

Facts

At issue was 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.

The decision of the Federal Labour Court

The Federal Labour Court has suspended the appeal proceedings and requested a preliminary ruling from the European Court of Justice.

In the opinion of the Federal Labour Court, granted annual leave, which overlapped with an officially ordered quarantine without the employee, being incapacitated for work was not to be granted under national law. The Federal Labour Court considered it relevant to decide whether this is compatible with Art. 7 of the Working Time Directive. The Federal Labour

Court therefore referred this question to the European Court of Justice for a preliminary ruling.

Consideration of restricted stock units in the amount of a waiting allowance	25.08.2022 - 8 AZR 453/21 -	**Restricted stock units (RSUs) are not to be taken into account for allowance if the agreement on the granting of the RSUs was not concluded with the employer but with the parent company of the corporate group.** **However, something else may apply if the contractual employer has entered into its own (co-)obligation with regard to the granting of the RSUs by the parent company. Whether this is the case depends on the specific circumstances of the individual case.** *The 8th Senate of the Federal Labour Court decided this.* Facts The Federal Labour Court had to decide 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 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 decision of the Federal Labour Court

The Federal Labour Court has ruled that the plaintiff is not entitled to payment of a higher waiting allowance.

Such a claim could only have arisen taking into account the RSUs granted to the plaintiff by the parent company. However, according to the Federal Labour Court, these are not "contractual benefits" within the meaning of the agreement reached under Section 15 of the employment contract on the amount of the waiting allowance. This agreement took up the

wording of Sec. 74 (2) HGB and was therefore to be understood as meaning that the defendant had promised the plaintiff a waiting allowance in the amount of the statutory minimum compensation.

Accordingly, nothing else applies to the interpretation of the term "contractual benefits" in Sec. 15 of the employment contract than to the interpretation of the corresponding legal term in Sec. 74, Subsection 2, HGB. The concept of "contractual benefits" within the meaning of Sec. 74 (2) HGB, on the basis of which the statutory (minimum) compensation for non-competition is calculated in the event of an agreement on a post-contractual non-competition clause, only includes those benefits which are based on the exchange character of the employment contract and which the employer owes the employee as remuneration for work performed. Since the plaintiff had not concluded the agreements on the granting of the RSUs with the defendant employer, but with the parent company, the consideration of the RSUs in the calculation of the compensation for waiting at least presupposed that the defendant had - expressly or impliedly - assumed a (co-)obligation with regard to the granting of these RSUs.

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		
Works Council's Right of Initiative in the Event of the Introduction of Electronic Time Recording	13.09.2022 - 1 ABR 22/21 -	In dispute is whether the petitioning works council has a right of initiative in the introduction of electronic time recording. The background to the proceedings is a negotiation between the employers involved and the works council on the conclusion of a works agreement on the recording of working hours. During the negotiations with the works council, the employers decided not to introduce electronic time recording in the company after all, with the result that the negotiations on a works agreement on time recording were broken off. At the request of the works council - in another court case - a conciliation body was set up on the subject of "Conclusion of a works agreement on the introduction and use of electronic time recording". In this conciliation body, the employers objected to its competence because the introduction of technical equipment within the meaning of Sec. 87 (1) No. 6 BetrVG is a purely defensive right to protect the personal rights of employees. Accordingly, the works council cannot demand the introduction of such equipment on its own initiative. In the present proceedings, the works council is seeking a declaration that it has a right of co-determination for the initiative introduction of electronic time recording. It was of the opinion that the employees could also have an interest in the introduction of an electronic time recording system, particularly when it comes to the precise recording of working hours and overtime.

		The Labour Court was of the opinion that the works council had no right of initiative in the introduction of electronic time recording. In contrast, the Regional Labour Court granted the works council such a right of initiative. In their appeal to the Federal Labour Court, the employers are seeking the reinstatement of the first-instance decision of the Labour Court.
Establishment of an employment relationship pursuant to §§ 9, 10 of the German Personnel Leasing Act (AÜG) **Extension of the maximum duration of temporary employment under collective bargaining agreements**	14.09.2022 - 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.
European Court of Justice		
Expiry of vacation entitlements in the event of permanent incapacity for work **Preliminary ruling of the Federal Labour Court**	22.09.2022 - C-518/20 - - C-727/20 -	The European Court of Justice decides whether the forfeiture of vacation not taken in the event of continued incapacity for work 15 months after the end of the vacation year is compatible with Art. 7 of the Working Time Directive and with Art. 31 of the European Charter of Fundamental Rights if the employee was not informed of the forfeiture. The background to the decision of the European Court of Justice is two references for a preliminary ruling from the Federal Labour Court: The plaintiff in one of the initial proceedings is severely disabled and has been receiving a pension due to full reduction in earning capacity since the end of 2014. He claimed in the proceedings before the Federal Labour Court that he was still entitled to 34 vacation days from 2014. The plaintiff in the other proceedings has been incapacitated for work since an illness in 2017 and was unable to take 14 vacation days this year. In both proceedings, the employer had not pointed out the forfeiture of the vacation entitlement. Already in 2018, the European Court of Justice ruled (Judgment from. 06.11.2018 - C-684/16, C-619/16) that the forfeiture of vacation entitlements pursuant to Section 7 (3) BUrlG could only be considered if the employer had complied with certain obligations to request and notify. Specifically, the employer would have to inform the employees how much vacation they were entitled to and that the vacation could expire. In addition, the employees would have to be requested individually to take the vacation to which they are entitled. According to the now established case law of the Federal Labour Court, statutory vacation entitlements expire 15 months after the end of the vacation year in the event of permanent incapacity for work. The European Court of Justice is now deciding whether vacation is also forfeited 15 months after the end of the vacation year if the employer has not complied with its obligations to request and notify.

Limitation of vacation claims Preliminary ruling of the Federal Labour Court	22.09.2021 - C-120/21 -	The European Court of Justice shall decide whether the limitation of vacation claims according to the regular limitation period of 3 years pursuant to Sec. 194 (1), 199 BGB is compatible with Art. 7 of the Working Time Directive (Directive 2003/88/EC) and Art. 31 (2) of the European Charter of Fundamental Rights. In particular, the European Court of Justice has to clarify whether European law permits the running of the limitation period under the conditions of Sec. 199 (1) BGB to begin at the end of the vacation year even if the employer has not fulfilled its obligations to request and notify the employees. The background to the reference for a preliminary ruling is a case before the Federal Labour Court in which the plaintiff asserted a claim for vacation compensation for a total of 101 vacation days from the years 2013 to 2017. Due to a high workload, the plaintiff was unable to take all of her annual leave for years. The defendant in the main proceedings is of the opinion that the plaintiff is not entitled to compensation for vacation because the vacation entitlement is in any case time-barred. The plaintiff, on the other hand, is of the opinion that the vacation entitlement is not subject to the statute of limitations because the defendant neither requested her to take her vacation nor pointed out a possible expiration. The European Court of Justice will now decide whether the limitation of vacation claims within the regular limitation period of three years is compatible with European law. You can find more information on this topic in our Legal Update (only available in German).

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
Whistleblower Protection Act passed by cabinet	27.07.2022 *Government draft*	The Whistleblower Protection Act was adopted by the Cabinet on July 27, 2022 and forwarded to the German Bundesrat on August 05, 2022. The government draft provides for the following central regulatory elements: ▪ The personal scope of application (Sec. 1 HinSchG) includes all persons who have obtained information about violations in their professional environment. ▪ The material scope of application (Sec. 2 HinSchG) takes up the legal areas specified by the Whistleblower Protection Directive. In order to avoid inconsistencies and to make the practical application manageable for whistleblowers as well as for internal and external reporting offices, criminal law and certain administrative offenses in particular have been included and the areas of law specified by the Whistleblower Protection Directive have been extended to a limited extent to corresponding national law. ▪ For persons providing information, two equally important reporting channels are provided, namely internal and external reporting channels, between which they can freely choose (Sec. 7 to 31 HinSchG). ▪ In implementation of the requirements of the Whistleblower Protection Directive and in compliance with the case law of the European Court of Human Rights, the conditions are defined under which a whistleblower may make information about violations publicly available (Sec. 32 HinSchG). ▪ Provided that whistleblowers comply with the requirements of the HinSchG for reporting or disclosure, they are extensively protected from reprisals such as dismissal or other disadvantages (Sec. 33 to 39 HinSchG).

Corona occupational health and safety regulation adapted	01.09.2022	Due to the expected increase in the number of infections in fall/winter, the Corona Occupational Health and Safety Ordinance has been revised. The ordinance comes into force on October 1, 2022 and applies up to and including April 7, 2023. The Federal Ministry of Labour and Social Affairs is relying on the familiar and proven measures: ▪ Hygiene concepts must continue to be implemented, adapted to the specific situation. ▪ The following still applies: keep your distance, observe hygiene and ventilate regularly. ▪ The mask requirement applies wherever other measures are not possible or not sufficient. ▪ Work-related contacts should be restricted, and in particular, rooms should not be used by more than one person at a time. ▪ Employers should check whether they offer home office and make test offers. ▪ Employers must continue to educate people about the risks of COVID-19 disease and inform them about the possibilities of vaccination and make this possible during working hours.

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