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YOUR BUSINESS LAW FIRM

Employment Tracker

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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 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 -	**Pursuant to Sec. 3 (2) no. 1 of the German Occupational Health and Safety Act (ArbSchG), the employer is obliged to introduce a system with which the working time worked by employees can be recorded. Due to this legal obligation, the works council cannot force the introduction of a system of (electronic) working time recording in the company with the help of the conciliation body. A corresponding right of co-determination pursuant to Sec. 87 of the Works Council Constitution Act (BetrVG) only exists if and to the extent that the operational matter is not already regulated by law.** *The 1st Senate of the Federal Labour Court decided this.* Facts In dispute was 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 decision of the Federal Labour Court

The Federal Labour Court has ruled that the works council does not have the right of initiative to introduce electronic working time recording.

This was mainly justified by the fact that the works council, according to Sec. 87 (1) of the introductory sentence of the Works Council Constitution Act (BetrVG), only has a say in social matters if there is no statutory or collectively agreed regulation. However, such a statutory provision exists in the form of Section 3 (2) No. 1 of the German Occupational Health and Safety Act (ArbSchG). If Sec. 3 (2) No. 1 ArbSchG is interpreted in conformity with Union law, the employer is legally obligated to record the working hours of the employees.

Further information on this decision and practical advice can be found in our Legal Update (only available in German).

Collective bargaining capability of ver.di	13.09.2022 - 1 ABR 24/21 -	**The United Services Union (ver.di) has collective bargaining power. This means that it can also conclude collective agreements in the care sector.** *This was decided by the 1st Senate of the Federal Labour Court.*

		Facts The Federal Labour Court had to decide whether ver.di has collective bargaining capacity in the care sector. Ver.di was founded in 2001 by a merger of five trade unions. It has around 1.9 million members and is responsible, among other things, for the care sector. The applicant - an employers' association for care facilities in Germany - has sought a declaration that ver.di does not have collective bargaining capacity in the care sector. In this sector, it lacks the necessary assertiveness vis-à-vis the employer side, which is conveyed by the number of organized employees. In the alternative, the petitioner asserted that ver.di is incapable of negotiating collective agreements in relation to its entire statutory organizational area. The decision of the Federal Labour Court The Federal Labour Court ruled that ver.di is capable of negotiating collective agreements. Collective bargaining capacity is the legal ability to effectively conclude collective agreements with the social counterpart in the organizational area claimed by the union itself. According to the established case law of the Federal Labour Court, this ability is uniform and indivisible for the claimed area of competence of an association. There is no partial collective bargaining capacity of a coalition limited to certain industries, regions, occupational groups or groups of persons. Therefore, ver.di also has collective bargaining capacity with regard to the care sector.
Establishment of an employment relationship pursuant to §§ 9, 10 of the German Personnel Leasing Act (AÜG)	14.09.2022 - 4 AZR 26/21 -	**In the case of temporary employee leasing, a collective bargaining agreement between the parties to the collective bargaining agreement in the industry of assignment may stipulate a different maximum leasing period in deviation from the legally permissible period of 18 months. This is also decisive for the leased employee and his employer (lender), irrespective of whether they are bound by the collective bargaining agreement.**

Extension of the maximum duration of temporary employment under collective bargaining agreements

The 4th Senate of the Federal Labour Court decided this.

Facts

The Federal Labour Court had 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 decision of the Federal Labour Court

The Federal Labour Court has ruled that "Südwestmetall" and "IG Metall" were entitled to extend the maximum duration for the deployment of temporary workers at the defendant by means of a collective agreement with effect also for the plaintiff and his employer (lender).

The Federal Labour Court based this primarily on the fact that Sec. 1 (1b) sentence 3 AÜG is a regulatory authorization provided for by the legislature outside the Collective Bargaining Act, which not only allows the parties to collective bargaining agreements in the industry of deployment to regulate the maximum duration of temporary employment in deviation from Sec. 1 (1b) sentence 1 AÜG in a binding manner for hirers bound by collective bargaining agreements, but also for lenders and temporary workers by means of a collective bargaining agreement, without it being relevant whether they are bound by collective bargaining agreements.

The statutory regulation is also in conformity with EU law and the constitution. The agreed maximum transfer period of 48 months was within the scope of the statutory regulatory authority and was therefore permissible.

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 forfeiture of vacation entitlements in the event of continued incapacity for work or full disability 15 months after the end of the vacation year is not compatible with Article 7 of the Working Time Directive and Article 31 of the European Charter of Fundamental Rights if the employer has not enabled the employee to exercise this entitlement in good time.

This was decided by the European Court of Justice in Joined Cases C-518/20 and C-727/20.

Facts

The European Court of Justice had to decide 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.

The decision of the European Court of Justice

The European Court of Justice has ruled that the forfeiture of vacation entitlements upon the onset of incapacity for work or full reduction in earning capacity in the current vacation year is not compatible with EU law if the employer has not previously complied with its obligations to request and inform.

The European Court of Justice once again emphasized that a regulation according to which vacation is forfeited after 15 months of continuous incapacity for work is compatible with EU law. Continuous incapacity for work constitutes a special circumstance, which justifies an exception to the rule according to which claims to paid annual leave cannot expire.

The decisive factor for the answer to the question referred for a preliminary ruling is therefore whether such an exception can also be assumed for the case in which the employee

only became incapacitated for work or fully incapacitated for work in the course of the vacation year. According to the European Court of Justice, it is incumbent on the employer to enable the employee to exercise his entitlement to paid annual leave. If he does not do so, the principle according to which claims to paid annual leave do not expire remains in force. Any other result would undermine the content of the entitlement to paid annual leave.

Limitation of vacation claims

22.09.2021

Preliminary ruling of the Federal Labour Court

- C-120/21 -

Article 7 of the Working Time Directive and Article 31 (2) of the European Charter of Fundamental Rights preclude the limitation of vacation entitlements if the employer has not actually enabled the employee to exercise this entitlement.

The European Court of Justice decided this.

Facts

The European Court of Justice had to 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.

The decision of the European Court of Justice

The European Court of Justice has ruled that vacation entitlements are only time-barred if the employee has been informed of his vacation entitlement.

In justification, the European Court of Justice decisively states that it would be contrary to the purpose pursued by Article 31 (2) of the European Charter of Fundamental Rights, namely to protect the health of the employee, if the employer could invoke the statute of limitations for the employee's vacation entitlement without having actually enabled the employee to exercise this vacation entitlement.

It is true that the employer has a legitimate interest in not having to be confronted with applications for leave or financial compensation for paid annual leave not taken which are based on entitlements acquired more than three years before the application was made. However, this interest is no longer justified if the employer, by refraining from enabling the employee to actually exercise the right to paid annual leave, has placed itself in a situation in which it is confronted with such requests and from which it could benefit to the detriment of the employee. Whether this is the case must be examined by the referring court in the initial proceedings.

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		
Effectiveness of a works agreement on a lawsuit waiver bonus when linked to a social plan severance payment	11.10.2022 - 1 AZR 129/21 -	The Federal Labour Court decides on the validity of a works agreement on a lawsuit waiver bonus if this is linked to a social compensation plan. The defendant employer concluded a social plan with the works council to mitigate the disadvantages suffered by employees because of a plant closure. Among other things, the social plan provides for a claim to severance pay for all employees who are dismissed for operational reasons, limited to a maximum amount of €75,000 (so-called cap). In addition to the reconciliation of interests and the social plan, the parties to the agreement concluded a works agreement on the same day regarding a lawsuit waiver bonus. This provides that employees who are entitled to a social plan settlement receive a higher settlement if they do not bring an action against unfair dismissal. The plaintiff's employment was terminated for operational reasons. He did not bring an action for unfair dismissal. In calculating the plaintiff's severance pay, the defendant also applied the capping limit of the social plan to the lawsuit waiver premium, so that according to the severance pay calculation the plaintiff was only entitled to severance pay in the maximum amount of €75,000. The plaintiff is of the opinion that he is entitled to payment of the lawsuit waiver premium without application of the cap. As it is contained in a separate provision, the lawsuit waiver

		premium is not a total settlement within the meaning of the provisions of the social compensation plan, which is why the cap contained in the social compensation plan does not apply to the lawsuit waiver premium. The lower courts (including Regional Labour Court of Nuremberg, judgment dated December 2, 2020 - 3 Sa 187/20) dismissed the action. The Regional Labour Court essentially stated that linking the payment of part of a social compensation plan with a waiver of the action for protection against dismissal was inappropriate and therefore invalid. This also applies if the waiver of action premium is regulated in a separate works agreement, but the premium is financed from the social plan volume. Contrary to the decision of the Labour Court, however, this does not lead to the invalidity of the works agreement as a whole. Rather, in such a case, the social plan and the works agreement are to be regarded as a unit with the consequence that the waiver premium increases the severance payment provided for in the social plan irrespective of whether or not an action for protection against dismissal has been brought. However, the uniform severance payment increased in this way is subject to the cap agreed in the social compensation plan. With his appeal to the Federal Labour Court, the plaintiff wants to achieve that he is awarded the higher severance payment claimed.
Effectiveness of a fixed term without object in the case of the takeover of a temporary employee by the customer after the end of the assignment	19.10.2022 - 7 AZR 259/21 -	The parties dispute whether a temporary employee can be effectively taken over by the customer (hirer) for a limited period of time after termination of the assignment. The plaintiff worked for the defendant for 6 months via a temporary employment agency. Following the assignment, the parties concluded an employment contract limited to 1 year, which was extended once by 6 months. The plaintiff contests the validity of the fixed term. She is of the opinion that the defendant is circumventing the maximum temporary employment period of 18 months (Sec. 1 (1b) Sentence 1 Temporary Employment Act (AÜG)) with the fixed term immediately following a temporary employment relationship. There was an abuse of rights on the part of the defendant, since the defendant filled permanent positions, on which the plaintiff had worked, with temporary employees in a rolling system. The Temporary Employment Directive 2008/104/EC, which regulates the prohibition of permanent leasing, prohibits permanent

		leasing not only in relation to temporary workers but also in relation to jobs. Therefore, Sec. 1 (1b) of the Temporary Employment Act must be interpreted in conformity with the Directive in such a way that the assignment of employees to permanent jobs is not permissible. The lower courts assumed the validity of the fixed-term contract and therefore dismissed the action. In its reasoning, the Regional Labour Court essentially stated that the prohibition of pre-employment (Sec. 14 (2) sentence 2 Part-Time and Fixed-term Employment Act (TzBfG)) only precludes a fixed-term employment contract if the parties to the employment contract are identical on both sides. This was not the case in the case of a takeover by a customer following a temporary assignment. In addition, the temporary employment relationship is generally not to be counted towards the maximum term of 18 months. Therefore, the hirer is in principle not prevented from hiring a temporary employee previously employed by him based on an employment contract without a fixed term. The Temporary Employment Directive does not provide any indication to the contrary. The plaintiff appealed against this decision to the Federal Labour Court.
Continuation of the term of office of the representative body for severely disabled persons if the number of severely disabled employees in a company falls below the threshold value	19.10.2022 - 7 ABR 27/21 -	It is in dispute whether the term of office of the representative body for severely disabled employees ends when the number of severely disabled employees falls below the threshold of five. The applicant was elected as a representative for severely disabled employees in one of the employer's two plants in 2019. After the number of severely disabled employees fell below the threshold of five (Sec. 177 (1) sentence 1 SGB IX) on August 1, 2020, the employer informed the applicant severely disabled representative body that the severely disabled employees of this establishment would in future be looked after by the severely disabled representative body of the other establishment. In the present proceedings, the representative body for severely disabled employees asserts its continued existence beyond August 1, 2020. She is of the opinion that the reduction in the number of severely disabled employees below the threshold value does not affect the existence of the representative body for severely disabled employees. For reasons of legal certainty, it is only important that the threshold value is reached at the time of the election.

		In contrast, the employer pointed out that for works constitution law it is recognized that the term of office of the works council ends when the number of employees employed in the company falls below the threshold value of five, which is decisive for the election of a works council. It was of the opinion that the same must also apply to the representation of severely disabled employees. If the number of severely disabled persons employed in the company falls below the relevant threshold, their office therefore ends. The Labour Court and the Regional Labour Court shared the opinion of the employer and rejected the application of the representative body for severely disabled persons. The employer has appealed against this decision to the Federal Labour Court.
Effectiveness of an agreed contractual penalty **Set-off with remaining remuneration**	20.10.2022 - 8 AZR 332/21 -	The Federal Labour Court decides whether the plaintiff has claims to remuneration against the defendant and whether the defendant has a claim to payment of a contractual penalty. In particular, the parties dispute whether the contractual penalty was validly agreed. The plaintiff was employed by the defendant as a physician and, within the scope of the employment relationship, completed further training as a specialist, which was to last 42 months at the defendant. After the end of the probationary period, the employment contract excluded ordinary termination for both parties for the duration of the further training. In the event that the employee terminated the employment relationship after the end of the probationary period in breach of the contract, the employment contract provided for a contractual penalty for remuneration. The contractual penalty was limited to the amount of the monthly remuneration lost because of the premature termination of the employment relationship up to the end of the 42-month period. While still undergoing further training, the plaintiff terminated the employment relationship with effect from February 28, 2018. The defendant employer then did not pay the plaintiff any remuneration in February, but instead asserted a contractual penalty against the plaintiff and offset this against the plaintiff's remuneration claim. In her action, the plaintiff demands payment of the remuneration for the month of February 2018. She is of the opinion that the defendant is not entitled to the contractual penalty. Due

		to the agreed minimum term of the contract, which is many times longer than the statutory notice period, it is unreasonably disadvantaged. The contractual penalty provision was therefore invalid. The defendant took the view that the claim to remuneration had lapsed. The agreed minimum term of the employment contract did not violate good faith and the contractual penalty was also effectively agreed in other respects and forfeited by the plaintiff's premature termination. The lower courts found in favour of the plaintiff and ordered the defendant to pay the claimed compensation. The defendant's counterclaim for payment of the contractual penalty was dismissed. The defendant appealed against this decision to the Federal Labour Court.
Compensation pursuant to Sec. 15 (2) of the General Equal Treatment Act (AGG) for failure to offer an alternative date for an interview	20.10.2022 - 8 AZR 258/21 -	The parties are disputing before the Federal Labour Court whether the plaintiff can claim compensation from the defendant under Sec. 15 (2) AGG for unlawful discrimination. In particular, the Federal Labour Court will have to decide whether employers must offer severely disabled applicants an alternative date for an interview if the applicant is unable to attend the date offered. The severely disabled plaintiff applied to the defendant in the summer for a position advertised by the defendant district. In her application, the plaintiff pointed out her severe disability. By letter dated July 31, 2018, the defendant invited her to an interview for the scheduled August 9, 2018, indicating that no alternative date was available. The plaintiff then informed the defendant that she was unable to attend the interview scheduled at short notice due to work commitments. She asked for the date to be rescheduled, citing various other conflicting dates. The defendant informed her that, as already stated in the invitation letter, no alternative date could be agreed. In her action, the plaintiff is seeking appropriate compensation. She is of the opinion that she was discriminated against in her application because of her severe disability. The disadvantage resulted from the fact that the invitation period for the job interview was much too short. The missing possibility of the agreement of an alternative date is an indication for a disadvantage in the sense of Sec. 22 AGG.

The defendant administrative district submitted that all applicants invited to the interview had been informed that an alternative date was not possible. The filling of the position had been urgent, therefore the invitation period had been short.

The lower courts awarded the plaintiff compensation in accordance with Sec. 15 (2) AGG and thus upheld her claim. The defendant district challenged this in its appeal, which was allowed by the Senate.

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
Ordinance Amending the Short-Time Worker Benefit Access Ordinance	14.09.2022 *Government draft*	According to the Cabinet decision of September 14, 2022, the provisions of the Short-Time Worker Benefit Access Ordinance on facilitated access to short-time work benefits are to be extended until December 31, 2022. The ordinance regulates in detail: ▪ The number of employees who must be affected by the work stoppage will remain lowered from at least one-third to at least 10% for companies. ▪ The build-up of negative working time balances prior to the granting of short-time allowances will continue to be completely waived. The aim of this regulation is to ensure that employment relationships are stabilized beyond September 30, 2022 by extending the simplified access requirements and that unemployment and, where appropriate, insolvencies are avoided.
Works meetings and meetings of the conciliation committee via video and telephone conference temporarily possible again	16.09.2022	The Act to Strengthen the Protection of the Population and, in particular, Vulnerable Groups from COVID-19 extended the provision of Sec. 129 of the Works Council Constitution Act (BetrVG), which was once limited until March 19, 2022. This again allows, among other things, works meetings and meetings as well as the adoption of resolutions by the conciliation committee by means of telephone and video conferencing for a limited period until April 7, 2023.

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