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Employment Tracker

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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		
Admissibility of a Fixed-Term Contract Pursuant to Sec. 14 (2) Sentences 1 and 2 of the Law on Part-Time Work and Fixed-Term Contracts (TzBfG) **Non-cash fixed-term contract after employee leasing with extended leasing period**	05.04.2023 - 7 AZR 223/22 -	**The permissibility of a fixed term without purpose does not conflict with the fact that the employee was previously assigned to the employer for work performance. This does not constitute prior employment within the meaning of Sec. 14 (2) Sentence 2 TzBfG, which would justify the inadmissibility of a fixed-term contract.** *The 7th Senate of the Federal Labour Court, thus confirming its case law from previous years, decided this.* The facts The Federal Labour Court had ruled on the permissibility of a fixed-term employment relationship under the German Law on Part-Time Work. A temporary employment agency had employed the plaintiff since 2016. The employment relationship was limited in time and the parties agreed on several contract extensions. Within the framework of this employment relationship, the employer transferred the plaintiff to the defendant in the form of a temporary employment agency. On December 5, 2013, the defendant, the employer and IG Metall concluded a collective agreement on the remuneration and employment conditions of temporary workers (TV VEZ).

According to this agreement, temporary workers could be leased for a maximum of 36 months instead of the statutory 18 months.

In 2019, the plaintiff entered into a temporary employment contract with the defendant and has been working as a production assistant September 1, 2019. According to this contract, the employment relationship was limited until May 31, 2020. The parties' employment relationship was governed by the collective agreements concluded between the defendant and IG Metall.

By letter dated May 12, 2020, the defendant notified the plaintiff of the termination of the employment relationship due to the expiration of the notice period.

The plaintiff defended himself with his lawsuit. He is of the opinion that the fixed term without material reason is inadmissible. Since the legally permissible maximum transfer period of 18 months had been exceeded, the parties already had a legally fictitious employment relationship. The extension of the maximum term of 36 months provided for in the TV VEZ did not apply to his employment relationship.

The decision of the Federal Labour Court

The 7th Senate of the Federal Labour Court did not share the plaintiff's opinion. Contrary to the opinion of the Regional Labour Court, the employment relationship of the parties had ended due to the agreed fixed term. The fixed-term employment relationship without purpose was permissible under Sec. 14 (2) TzBfG, and thus legally effective.

In particular, the fact that the plaintiff had previously been assigned to work for the defendant did not preclude the permissibility of the fixed-term employment relationship. The prohibition of the temporary employment of previously employed employees (Sec. 14 (2) TzBfG) is not triggered in such a constellation.

Due to the effective extension of the maximum fixed-term employment relationship by collective agreement, no employment relationship exists between the parties (Sec. 9 (1) No.

		1b, Sec. 10 (1) Sentence 1 AÜG). The extended maximum temporary employment period has not been exceeded.
Requirements for the application of the presumption of conformity pursuant to Sec. 125 (1) sentence 1 no. 1 Insolvency Code (InsO)	17.08.2023 - 6 AZR 56/23 -	**If a change in operations within the meaning of Sec. 111 of the German Works Constitution Act (BetrVG) is planned and the insolvency administrator and the works council conclude a reconciliation of interests with a list of names, it is presumed pursuant to Sec. 125 (1) no. 1 InsO that the termination of the employee included in the list of names is due to urgent operational requirements within the meaning of Sec. 1 (2) of the German Dismissal Protection Act (KSchG). At the time of the conclusion of the reconciliation of interests, the operational change must still be in the planning phase so that the works council can influence the entrepreneurial decision in accordance with the purpose of Sec. 111 BetrVG.** *The 6th Senate of the Federal Labour Court decided this.* The facts The Federal Labour Court ruled on the validity of two ordinary terminations for operational reasons. In particular, the question was whether the presumption of the existence of operational reasons pursuant to Sec. 125 (1) sentence 1 InsO applied. The plaintiff challenged two notices of termination for operational reasons issued to him in connection with a plant closure. Prior to this, insolvency proceedings had been opened against the employer's assets. After no acceptable offer to take over the business was received, the insolvency administrator entered into a reconciliation of interests with the works council. According to this agreement, the company was to be closed down after the end of production and all employment contracts were to be terminated. The reconciliation of interests included a list of all employees to be dismissed, including the plaintiff. Approximately 6 months after the termination, the defendant (nevertheless) sold parts of the business to the former main customer.

		For this reason, the plaintiff considers the notices of termination issued to him to be ineffective. In his opinion, the notices of termination were issued only as a precautionary measure in case negotiations with potential purchasers failed. Even after the notices of termination were issued, negotiations with interested parties on the sale of the business continued. In contrast, the defendant stated that a termination for operational reasons was assumed on the basis of the reconciliation of interests with a list of names pursuant to Sec. 125 (1) sentence 1 no. 1 InsO. At the time of the termination, he had decided to shut down the entire business for good. It was only one month after the termination that the main customers expressed an interest in acquiring parts of the business. The decision of the Federal Labour Court In the opinion of the Federal Labour Court, the termination for operational reasons is effective in any case based on the presumption of Sec. 125 (1) no. 1 InsO. The defendant insolvency administrator had sufficiently proven that the operational change on which the termination was based was in the planning phase pursuant to Sec. 125 (1) sentence 1 InsO. The insolvency administrator was not required to prove that he had already actually initiated the shutdown.
Termination due to offensive language in a chat group	25.08.2023 - 2 AZR 17/23 -	**An employee who makes strongly insulting, racist, sexist, and violent remarks about superiors and other colleagues in a private chat group consisting of seven members can only in exceptional cases invoke a legitimate expectation of confidentiality as a reason for the extraordinary termination of his employment.** *The 2nd Senate of the Federal Labour Court decided this.* The facts In a chat group with five other employees, the plaintiff made insulting and inhumane comments about superiors and colleagues, in addition to purely private topics. When the employer became aware of this, it terminated the plaintiff's employment without notice.

In his lawsuit, the plaintiff challenges the extraordinary termination. The plaintiff is of the opinion that the contents of the chat history should not have been used by the defendant and should not be used in the lawsuit because it was a purely private exchange.

The decision of the Federal Labour Court

The Federal Labour Court ruled that the defendant's termination for cause was valid.

The plaintiff had no legitimate expectation of confidentiality with respect to the statements he was accused of making. An expectation of confidentiality is justified only if the members of the chat group can claim the special protection of personal rights of a sphere of confidential communication. This depends on the content of the messages exchanged and the size and composition of the chat group.

If offensive and inhumane remarks are made about Company employees in the chat group, the employee must explain in particular why he or she could expect that the content of the message would not be disclosed to third parties.

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		
Entitlement to part-time employment during parental leave	05.09.2023 - 9 AZR 329/22 -	The parties dispute part-time employment and the associated remuneration during parental leave. The plaintiff applied to the defendant employer for parental leave for his son and at the same time for part-time employment for this period pursuant to Sec. 15 (7) of the Federal Parental Allowance and Parental Leave Act (BEEG). Shortly before this application, a general works agreement on a reconciliation of interests and social plan was concluded at the defendant, according to which several areas of activity were to be eliminated. The employees affected by the measure through job loss – including the plaintiff – were designated by name. The defendant rejected the plaintiff's application for part-time work during parental leave, citing urgent operational reasons. The reason given was the partial relocation of the plaintiff's area of activity and the associated restructuring, for which reason the plaintiff's job would be eliminated without replacement. In his lawsuit, the plaintiff is seeking, among other things, employment during parental leave in the amount of 30 hours per week. He is of the opinion that the defendant has already rejected his application for parental leave in the letter of rejection in an inappropriate form. He also doubted that urgent operational reasons precluded his request for parental leave,

		and in particular that there was no statutory presumption in this regard under Sec. 1 (5) of the German Unfair Dismissals Act (KSchG). The Labour Court dismissed the claim for employment during parental leave, the Regional Labour Court (Berlin, judgment dated July 20, 2022 - 4 Sa 847) upheld it. The Regional Labour Court essentially states that the requirements for the reduction of working time during parental leave pursuant to Sec. 15 (7) BEEG are met. In particular, the presumption pursuant to Sec. 1 (5) (KSchG) for the existence of urgent operational reasons is not applicable. The appeal of the defendant is directed against this.
Reduction of the standard severance payment for cohorts close to retirement age	19.09.2023 - 1 AZR 15/23 -	The German Federal Labour Court will decide whether the reduction of severance pay for employees approaching retirement age is to be regarded as unlawful age discrimination. The employment of the parties was terminated for operational reasons. The social plan agreed between the parties provided for a severance payment. The amount of the severance payment was based, inter alia, on the age factor. This factor was 1.0 up to the age of 61 and 0.25 from the age of 62. The plaintiff is of the opinion that the provision in the social plan is age discriminatory and therefore demands a higher severance payment. The defendant argues that the unequal treatment is justified. It is permissible for the parties to a social plan to provide for lower benefits for employees nearing retirement age. Without the age factor contained in the social plan, employees close to retirement age would have been disproportionately favoured. The lower courts found in favour of the defendant and did not award the plaintiff a higher severance payment. The Regional Labour Court found that the discrimination against older employees was justified under Sec. 10 sentence 2, No. 6, in conjunction with Sec. 10, sentence 2, AGG. Greater consideration of the economic disadvantages threatening employees who are far from retirement is permissible. Employees up to the age of 62 and employees

over the age of 62 are distinguished by the fact that the former, in the event of prolonged unemployment, can typically only claim the needs-based basic security for jobseekers under the Second Book of the Social Code (SGB II) as a means of securing their livelihood.

In his appeal to the Federal Labour Court, the plaintiff continues to seek the award of a higher severance payment.

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
Maternity Protection Committee publishes risk assessment guidelines	08.08.2023	The Maternity Protection Committee has published the first rule on risk assessment in the field of maternity protection. According to the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, the guideline is intended to support employers in carrying out the risk assessment under maternity protection law. The aim of the risk assessment is to identify any hazards to the pregnant or breastfeeding woman or her child in connection with her work or during her training. On this basis, appropriate protective measures are to be derived to enable the pregnant or breastfeeding woman to participate safely in training or in working life. The first maternity protection rule also specifies the design of working conditions, the order of priority of protective measures, and the documentation and information to be provided by employers. The rule also refers to unacceptable working hours, unacceptable activities, and working conditions.
Higher minimum wages in elder care	29.08.2023	According to a press release from the BMAS, the Care Commission has unanimously voted in favour of higher minimum wages for care workers: By July 1, 2025, minimum wages for care workers in Germany are to be raised in two steps. According to the Commission's new recommendation, the minimum wages for care workers will increase as follows ▪ For care assistants: 15.50 euros per hour from 1. May 2024; 16.10 euros per hour from July 1, 2025.

	▪ For qualified care assistants: 16.50 euros per hour as of May 1, 2024; 17.35 euros per hour as of July 1, 2025. ▪ For qualified nursing assistants: 19.50 euros per hour as of May 1, 2024; 20.50 euros per hour as of July 1, 2025 For employees in geriatric care, the Care Commission continues to recommend an entitlement to additional paid leave over and above the statutory leave entitlement of nine days per calendar year (based on a 5-day week). In its recommendation, the Care Commission advocated a duration until June 30, 2026.

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