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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.

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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 co-determination in the case of instructions to refrain from private use of mobile phones/smartphones during working hours	17.10.2023 - 1 ABR 24/22 -	**The works council has no right of co-determination regarding the ban on private cell phone use at the workplace.** *The 1st Senate of the Federal Labour Court, thus confirming the decision of the lower court, decided this.* Facts The issue was whether the prohibition of private use of cell phones/smartphones during working hours is subject to works council co-determination. The employer has issued a written notice stating that the use of mobile phones/smartphones during working hours is not permitted and that there will be consequences under employment law if this is not complied with. The works council is of the opinion that the employer should have consulted it beforehand. Its right of co-determination follows from the fact that at least the proper conduct of the employees is affected. The use of a smartphone does not necessarily and inevitably interfere with the performance of duties under the employment contract. The works council initiated a resolution procedure to clarify this issue.

The employer, on the other hand, is of the opinion that there is no right of co-determination because only the employees' work behaviour is affected. The prohibition merely substantiates the duty to work.

The lower courts (including the Lower Saxony Regional Labour Court, decision dated October 13, 2022 – 3 TaBV 24/22), rejected the works council's motions. According to Section 87 (1) no. 1 of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*), the ban on using smartphones for personal purposes during work hours is not subject to co-determination by the works council. According to the primary regulatory purpose of this directive, it does not regulate behaviours that accompany work. The goal of the measure is to identify which activities employees must avoid during working hours.

Decision of the Federal Labour Court

The Federal Labour Court rejected the works council's appeal on points of law and thus confirmed the decision of the lower court.

The result is that the ban on private cell phone use at the workplace is not subject to co-determination by the works council. Whether the Federal Labour Court will also agree with the lower court in its reasoning is still unclear, as the reasons for the decision are not yet available.

Work on call **Duration of the weekly working time**	18.10.2023 - 5 AZR 22/23 -	**If the employer and the employee agree to work on call but do not specify the duration of the weekly working time, a working time of 20 hours per week shall be deemed to have been agreed in principle in accordance with Sec. 12 (1) sentence 3 of the German Part-Time Working and Fixed-Term Employment Act *(Teilzeit- und Befristungsgesetz - TzBfG)*. A deviation from this can only be assumed by way of supplementary interpretation of the contract if the statutory provision is not appropriate and there are objective indications that the parties would have unanimously intended a different duration of the weekly working time when the contract was concluded.**

The 5th Senate of the Federal Labour Court decided this.
- Communicated by press release dated October 18, 2023 -

Facts

The plaintiff, who was employed as a call-off employee by the defendant employer, was called to work in varying time scales as required in the absence of a contractual regulation on the duration of the weekly working time.

After the scope of the call-up of her work performance decreased from the year 2020 compared to the immediately preceding years, the plaintiff asserted claims for default of acceptance. She is of the opinion that a supplementary interpretation of the contract shows that the average working time called off from previous years is the working time now owed and to be remunerated.

The lower courts upheld the claim only in part. Based on the statutory provision of Sec. 12 (1) sentence 3 TzBfG, the duration of the weekly working time in the call-off relationship was 20 hours. Insofar as the work performed by the plaintiff in individual weeks fell short of 20 hours, the plaintiff was granted claims for default of acceptance; claims in excess of this were rejected.

Decision of the Federal Labour Court

The plaintiff's appeal, in which she maintains further-reaching claims for default of acceptance, was unsuccessful before the 5th Senate of the Federal Labour Court.

The Federal Labour Court essentially stated that in the case of on-call work under Sec. 12 (1) sentence 2 TzBfG, the employer and employee must stipulate a specific duration of the weekly working time in the employment contract. If they fail to do so, Sec. 12 (1) sentence 3 TzBfG closes this loophole in that a working time of 20 hours is deemed to be agreed by operation of law.

If the initial gap in the employment contract regarding the duration of the weekly working time at the beginning of the employment relationship is closed by the legal fiction of Sec. 12 (1) sentence 3 TzBfG, the parties may subsequently expressly or impliedly agree on a

different duration of the contractual working time. However, the Federal Labour Court ruled that the employer's call-off behaviour alone in a specific, seemingly arbitrary period long after the start of the employment relationship is not sufficient for this.

A deviating duration of the weekly working time can only be assumed if a working time of 20 hours deemed to be agreed is not an appropriate regulation in the employment relationship in question and there are objective indications that the employer and employee would have agreed on a higher or lower duration of the weekly working time at the time of conclusion of the contract if they had been aware of the loophole. However, the plaintiff had not provided any evidence for such an assumption.

European Court of Justice		
Overtime surcharges for part-time employees **Preliminary ruling of the Federal Labour Court**	19.10.2023 - C-660/20 -	**Part-time employees may not be treated worse when it comes to receiving increased remuneration because of a certain number of hours worked.** *The European Court of Justice decided this in case C-660/20.* *- Communicated by press release dated October 19, 2023 -* Facts The parties to the main proceedings dispute overtime pay for part-time employees. The plaintiff works part-time as a pilot for the airline Lufthansa CityLine. His employment contract provides that he receives a basic remuneration based on the flight duty time. In addition, he may receive additional compensation if he performs a certain number of flight duty hours per month and exceeds thresholds that are contractually defined for this purpose. However, these thresholds are the same for full-time pilots and for part-time pilots. The plaintiff in the main proceedings is of the opinion that the thresholds should be reduced, taking into account the number of hours worked by him on account of his part-time work. He is entitled to additional remuneration when the so-called trigger limits are exceeded, if these are reduced in relation to the hours worked.

The German Federal Labour Court, which was involved in the legal dispute between the pilot and Lufthansa CityLine, has submitted a request for a preliminary ruling to the Court of Justice. It wants to know whether a national regulation according to which a part-time employee must work the same number of hours as a full-time employee in order to receive additional remuneration constitutes discrimination that is prohibited under European Union law.

The decision of the European Court of Justice

The European Court of Justice has ruled that the disputed national regulation on overtime pay leads to worse treatment of part-time pilots and therefore violates European Union law, unless this treatment is justified by an objective reason.

In its reasoning, the European Court of Justice essentially states that the existence of identical thresholds for overtime bonuses places a greater burden on pilots working part-time and that they are far less likely to meet the eligibility requirements for the additional remuneration than their colleagues working full-time. This constitutes unequal treatment contrary to Union law. Whether this unequal treatment is justified must be examined by the Federal Labour Court in the light of this ruling.

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		
Replacement of the Works Council's Consent to the Hiring of an Employee **Informing the works council by means of electronic access to an applicant database**	14.11.2023 - 1 ABR 28/22 -	The parties dispute whether the submission of the required application documents within the meaning of Sec. 99 (1) sentence 1 of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*) must be in paper form. Due to a planned new hire, the employer requested the consent of the works council formed at the employer pursuant to Sec. 99 BetrVG. The works council then informed the employer that it was not yet in a position to issue a final statement because it did not yet have all the information and documents necessary for its decision. After the requested documents had been made available, the works council refused to give its consent pursuant to Sec. 99 (2) No. 3 BetrVG (Works Council Constitution Act) because the recruitment would be detrimental to employees who were already employed, without this being justified for operational or personal reasons. The employer then initiated proceedings to have the consent of the works council replaced by the labour court. The works council was of the opinion that the procedure to replace the consent had not been properly initiated because the employer had not adequately informed the works council and, in particular, had not provided it with the application documents in paper form, so that the period pursuant to Sec. 99 (3) Sentence 1 BetrVG, had not even begun to run. Even if one assumes that the application was nevertheless properly initiated, the works council was

		justified in refusing to give its consent. Because of the intended recruitment, already employed employees were threatened with disadvantages in the form of a reduction in performance and workload. The employer argued that the works council had been fully informed about the planned recruitment. The works council had access to all application documents of all applicants. The employer uses a software program to record job advertisements and application procedures in which all application documents are entered digitally. There was no requirement to physically hand over the paper documents. Moreover, there was no reason to refuse consent. The lower courts (including the Saxony-Anhalt Regional Labour Court, decision dated October 13, 2022 - 2 TaBV 1/22) rejected the motions of the works council and replaced the consent of the works council to the hiring. The Regional Labour Court states that the procedure for replacing the consent was duly initiated in accordance with the requirements of Sec. 99 (1) BetrVG and that there was no sufficient reason for refusing the consent. In particular, the required application documents do not have to be submitted in paper form, but can also be submitted in such a way that the works council members, who have access to service laptops, are given comprehensive access to an applicant management tool in the course of being informed about an intended recruitment. The works council appealed against the decision of the lower courts to the Federal Labour Court.
Entitlement to Payment of Compensation under a Social Plan **Admissibility of the exclusion of employees with a fixed term from the scope of a social plan**	14.11.2023 - 1 AZR 62/23 -	In dispute is whether the plaintiff is entitled to payment of a social compensation plan, although fixed-term employees - such as the plaintiff - are excluded from the scope of the social compensation plan. The plaintiff was employed by the defendant employer as an aircraft tanker attendant for a fixed term. Due to the planned closure of the defendant's plant, the defendant concluded a reconciliation of interests and a social plan with the works council formed at the defendant. Employees with fixed-term employment contracts were excluded from the scope of the social plan.

		In the opinion of the plaintiff, he is entitled to payment of compensation under the social plan. According to the plaintiff, the exclusion of employees with fixed-term contracts violated the prohibition of discrimination under Sec. 4 (2) TzBfG and was therefore invalid. The Labour Court was of the opinion that the plaintiff was not entitled to compensation under the social compensation plan. The Regional Labour Court (Berlin-Brandenburg, judgment dated September 20, 2022 - 8 Sa 425/22), on the other hand, awarded the plaintiff the social plan compensation claimed. The Regional Labour Court followed the plaintiff's view and ruled that the exclusion of employees employed for a fixed term from the scope of a social compensation plan constitutes a disadvantage due to the fixed term, which is not justified by objective reasons if the purpose of the fixed term coincides in content with the operational change in the form of a plant closure. The employment relationship then ends not only because of or due to the fixed term, but also due to the plant closure. Employees with a fixed term are exposed to the same bridging situation and require the same compensation as employees with an unlimited term. The defendant appealed against this decision to the Federal Labour Court.
Extraordinary dismissal for feigning inoculation incapacity	16.11.2023 - 2 AZR 55/23 -	The Federal Labour Court decides whether the submission of a provisional vaccination certificate from the Internet can justify extraordinary termination. The plaintiff worked as a nursing assistant for the defendant employer. The defendant informed all employees that, pursuant to Sec. 20a (1) of the Infection Protection Act (IfSG), they must submit either proof of complete vaccination protection against the Corona virus, proof of recovery or a certificate of vaccination fitness. The plaintiff submitted to the defendant a certificate of provisional inoculation capability, which the plaintiff had acquired from the Internet against payment of a fee. There was no direct personal, telephone or digital communication with the doctor whose signature is printed on the certificate. Due to the defendant's conviction of the incorrectness of the submitted certificate, the defendant called in the health authority and, after hearing the works council, terminated the employment relationship extraordinarily, or alternatively extraordinarily with a social termination period.

		In her action, the plaintiff contests the extraordinary termination of her employment relationship. She is of the opinion that there is no extraordinary reason for termination. The defendant claimed that the plaintiff had deceived her by presenting a document that was obviously not based on a medical examination about a supposedly existing inoculation capability. This conduct irreparably destroyed the relationship of trust. The Labour Court granted the claim; the Regional Labour Court (Schleswig-Holstein, judgment of November 24, 2022 - 4 Sa 139/22) dismissed it. According to the reasoning of the Regional Labour Court, the acquisition of a provisional vaccination certificate from the Internet without a medical consultation/examination in person or at least by telephone and the presentation of such a certificate to the employer is to be seen as a significant breach of ancillary duties. Such behaviour constitutes an extraordinary reason for termination "per se". Such action in disregard of the requirements of § 20a, Subsection 2, Sentence 1, No. 3 IfSG remains a serious breach of duty even taking into account the fact that the plaintiff is afraid of the consequences of a vaccination. The plaintiff appealed against the decision of the Regional Labour Court to the Federal Labour Court.
Indications of discrimination according to Sec. 22 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz – AGG*) in the case of the "third gender"	21.11.2023 - 8 AZR 164/22 -	The parties dispute the payment of compensation under the General Equal Treatment Act. The plaintiff applied for a job advertisement of the defendant. In her application, the plaintiff pointed out her bisexuality and her existing severe disability. The defendant was invited to an interview, which she was unable to attend due to time constraints. For this reason, she asked for an alternative date, which, according to the defendant, could not be granted because the selection committee could not meet in time due to other appointments. After completion of the selection procedure, the plaintiff was then informed that her application had not been successful. The plaintiff is now seeking payment of compensation on the grounds of discrimination on account of her gender and severe disability. She is of the opinion that the job advertisement in dispute was not written in a gender-neutral way, among other things because of the gender asterisk used in it. The defendant also failed to use gender-neutral wording in its letter,

	although the plaintiff expressly pointed out that she wished to be addressed by the abbreviation "Herm"(abbreviation of hermaphroditism). The lower courts (including the Hesse Regional Labour Court, judgment dated November 5, 2021 - 3 Sa 840/20) dismissed the action. The plaintiff was not disadvantaged because of her gender or her severe disability. A place is not already written out contrary to Sec. 11 AGG under offence against the discrimination prohibition after Sec. 7 AGG, if the gender asterisk is used with person designations between masculine and feminine ending. The one-time address of the plaintiff party as "Dear Ms/Mr XX" also did not constitute an indication of discrimination against the plaintiff party when considered as a whole. The plaintiff party contests this with its 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
Commission on "Legal Certainty in Works Council Compensation" presents proposals for legislative amendments	29.09.2023	In response to the ruling of the 6th Criminal Division of the Federal Court of Justice in the VW works council compensation case (ruling dated January 10, 2023 - 6 StR 133/22), the Federal Ministry of Labour and Social Affairs (BMAS) set up a commission in early summer to submit expert proposals for a legally secure structure for works council compensation. The commission submitted its proposals to the BMAS in July 2023. The BMAS published the commission's proposals on September 29, 2023. In order to concretize the legal framework and to create more legal certainty in clarification of the current legal situation, the Commission proposes an update of both Sec. 37 (4) of the Works Council Constitution Act (BetrVG) and Sec. 78 sentence 2 BetrVG in line with the principle of honorary office. The more precise regulation reduces the risk of criminal liability of employers acting in good faith and of works council officers. The members of the works council do not receive any additional or increased remuneration because of the proposed amendments.
Federal Cabinet decides on social security calculation figure for 2024	11.10.2023	According to the press release of the BMAS, the Cabinet approved the Ordinance on Social Security Calculation Sizes 2024 on October 11. The following changes result: ▪ The reference amount will increase to 3,535 euros/month in 2024, and the reference amount for the East will increase to 3,465 euros/month. ▪ The income threshold for contributions to the general pension insurance scheme will increase to 7,550 euros/month, the income threshold for contributions to the East to 7,450 euros/month. ▪ The nationally uniform compulsory insurance limit for statutory health insurance (annual earnings limit) is 69,300 euros in 2024.

	▪ The income threshold for statutory health insurance, which is also uniform throughout Germany, will rise to 62,100 euros per year or 5,175 euros per month.

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