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Employment Tracker

JANUARY 2024

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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		
Duty to inquire about shift schedule changes outside of working hours?	23.08.2023 - 5 AZR 349/22 -	**Employees are also required to comply with all instructions regarding assigned services outside of working hours. This is an ancillary duty directly related to the duty to work.** *The 5th Senate of the Federal Labour Court decided this. The reasons for the decision were recently published.* Facts The plaintiff is defending himself against the deduction of hours from his working time account and against a warning issued by the defendant employer. In particular, it is disputed whether the plaintiff was obliged to inform himself about changes in the duty roster during his free time. The plaintiff works for the defendant as a paramedic. For two days of unexcused absences, the defendant issued a warning to the plaintiff and deducted the relevant hours from his working time account. On the days in question, the plaintiff was assigned as a floater, meaning that he was not initially assigned to a specific shift. According to the relevant company agreement, the concrete assignment of floater duties can be made up to 8 p.m. of the previous day before the

start of the shift. If no specific information is provided, the jumpers must notify the company by telephone at 7:30 a.m. on the day of the shift that they are ready to work.

On the two days in question, the plaintiff was scheduled for a shift that began at 6:00 a.m. and 6:30 a.m. the day before. On the days in question, the plaintiff was not at work and could not be reached by telephone. As a result, the defendant informed him of the details of the shift by text message. At 7:30 a.m. on the day in question, the plaintiff reported that he was available by telephone.

On the first occasion, the defendant assigned another employee to the shift in question because the plaintiff could not be reached by telephone. On the second occasion, the plaintiff reported to work at 8:26 a.m. instead of 6:30 a.m. The defendant considered both the no-show and the tardiness to be unexcused absences and issued a warning to the plaintiff.

The plaintiff argued, among other things, that the specification of the duties took place after the expiration of the period stipulated in the company agreement and therefore did not have to be followed by him. In particular, he was not obliged to find out when he had to work during his free time. In doing so, the defendant circumvented the standby duty agreement in order to save costs. The short-term arrangement also violates Sec. 12 (3) TzBfG, but at least violates the principle of equitable discretion.

The defendant is of the opinion that the plaintiff is obliged to inform himself about his working hours. The time during which he informs himself should not be considered working time. Since the plaintiff did not answer the phone and did not respond to the text message, he was absent without excuse.

Decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the defendant employer.

The plaintiff was not entitled to time credit on the working time account kept for him. The defendant was not in default of acceptance. The plaintiff was indeed required to report for work at 6:00 a.m. because the defendant had effectively specified the plaintiff's duty and had given him instructions to that effect.

		The plaintiff could not claim that he was unaware of the effective specification of the shift. The plaintiff received the defendant's instruction. The plaintiff had a secondary obligation under the contractual relationship to take note of the assignment of the service. The plaintiff has to fulfil this duty even outside his actual working hours as a paramedic. This duty to cooperate does not constitute an obligation to be constantly available. It was up to the plaintiff to decide when and where to take note of the notice of his assignment.
De facto employment relationship under Sec. 9, 10 of the German Temporary Employment Act (AÜG) **Illegality of the group privilege under Sec. 1 (3) No. 2 AÜG under European law**	05.12.2023 - 9 AZR 110/23 -	The oral hearing was cancelled due to a settlement between the parties.
Entitlement to continued payment of wages **Evidentiary value of a certificate of incapacity in the case of daily incapacity during the notice period**	13.12.2023 - 5 AZR 137/23 -	**The evidentiary value of (subsequent) certificates of incapacity may be undermined if the employee who is unable to work submits one or more subsequent certificates after receiving notice of termination, which cover the exact period of the notice period, and takes up new employment immediately after termination of the employment relationship.** *The 5th Senate of the Federal Labour Court decided this.* *- Communicated by press release of December 13, 2023 -* Facts The parties disagreed as to whether the evidentiary value of a certificate of incapacity to work in the case of daily incapacity to work with a notice period is also undermined in the case of termination by the employer. The plaintiff, who was employed by the defendant employer, was incapacitated for work and submitted a certificate of incapacity to the defendant. On the same day, the defendant duly terminated the employment relationship as of May 31, 2022. In two subsequent certificates,

the plaintiff's continued incapacity for work was established until May 31, 2022. The defendant did not pay any continued compensation.

By his lawsuit, the plaintiff requests the payment of continued compensation for the period of incapacity certified by a doctor. The plaintiff is of the opinion that the temporal coincidence between the notice period and the period of incapacity to work, which the Federal Labour Court cited in its decision of September 8, 2021 - 5 AZR 149/21 - to invalidate the evidentiary value of a certificate of incapacity to work, presupposes - if it is also to be applied to terminations by the employer - that the employee first receives the notice of termination and only then submits a sick note or a certificate of incapacity to work.

The defendant countered that the evidentiary value of the certificate of incapacity was undermined by the fact that certificates of incapacity had covered the entire remainder of the employment relationship. The fact that the plaintiff had recovered only at the beginning of the new employment relationship after the end of the notice period also undermined its probative value.

Decision of the Federal Labour Court

The 5th Senate has decided that the evidentiary value of the certificate of incapacity to work submitted for the period from May 7 to May 31, 2022 has been invalidated.

In order to invalidate the certificate, it is irrelevant whether the employee or the employer terminates the employment relationship and whether one or more certificates of incapacity are submitted to prove the incapacity.

However, a case-by-case assessment of the totality of the circumstances is always required. Accordingly, the Court of Appeal correctly recognized that the evidentiary value of the certificate dated May 2, 2022, was not undermined. There was no coincidence in time between the beginning of the disability and the receipt of the notice of termination. According to the findings, the plaintiff had no knowledge of the intended termination of the employment relationship at the time the certificate of incapacity was submitted.

However, the evidentiary value of the certificates of incapacity for work dated May 6, 2022 and May 20, 2022 was undermined. In this regard, the Regional Labour Court did not sufficiently take into account the fact that there was a coincidence in time between the exact

		extension of the incapacity to work and the notice period specified in the subsequent certificates, and that the plaintiff took up new employment immediately after the termination of the employment relationship. As a result, the plaintiff now bears the full burden of showing and proving the existence of an incapacity for work due to illness as a prerequisite for the entitlement to continued remuneration pursuant to Sec. 3 (1) EFZG for the period from May 7 to May 31, 2022.
Notification of Mass Dismissals **Invalidity of Dismissal as a Sanction for Violations of the Obligation under Sec. 17(1), (3) of the German Unfair Dismissals Act (KSchG)**	14.12.2023 - 6 AZR 157/22 -	**The Sixth Senate of the Federal Labour Court intends to abandon its case law according to which a dismissal in the context of a mass dismissal is invalid due to a violation of a statutory prohibition within the meaning of Section 134 of the German Civil Code (BGB) if, at the time the dismissal is declared, there is no or incorrect notification pursuant to Section 17 (1), (3) of the German Unfair Dismissals Act (KSchG).** *The 6th Senate of the Federal Labour Court in a press release dated December 14, 2023 announced this.* Facts The parties are in dispute as to the legal consequences of the employer's breach of its obligations under Sec. 17 (1) and (3) of the German Unfair Dismissals Act (KSchG). The plaintiff and 10 other employees were dismissed for operational reasons after insolvency proceedings were opened in respect of the employer's assets. At the time of the insolvency application, the employer had 25 employees. The plaintiff contends that the dismissal was invalid because the employer failed to give the required notice of mass dismissal. The defendant insolvency administrator, on the other hand, is of the opinion that a mass redundancy notice was not required because the relevant size of the company, generally more than 20 employees, was not reached. The relevant date for determining the size of the company was the day of the dismissal. Before that date, however, 6 employees had already left the company.

		The decision of the Federal Labour Court The Federal Labour Court suspended the proceedings in accordance with Sec. 148 ZPO. The change in case law intended by the 6th Senate constitutes a deviation from the case law of the 2nd Senate of the Federal Labour Court that is relevant to the decision. The recognizing senate therefore inquired whether the 2nd Senate adheres to its legal opinion and suspended the legal dispute until the divergence inquiry is answered in accordance with Sec. 148 ZPO. As the legal question also concerns the proceedings - 6 AZR 155/21 (B) - and - 6 AZR 121/22 (B) -, these were also suspended.
European Court of Justice		
Requirements for imposing a fine for a GDPR violation	05.12.2023 - C-683/21 - - C-807/21 -	**Only a culpable breach of the GDPR can lead to the imposition of a fine.** *This was recently decided by the ECJ.* *- Communicated by press release dated December 05, 2023 -* Facts A Lithuanian and a German court have asked the Court of Justice to interpret the GDPR in relation to the possibility for national supervisory authorities to punish breaches of the regulation by imposing a fine on the data controller. In the Lithuanian case, the National Centre for Public Health at the Ministry of Health is challenging a fine of EUR 12,000 imposed on it in connection with the development (with the assistance of a private company) of a mobile application designed to collect and monitor the data of persons exposed to the Covid-19 virus. In the German case, the real estate company “Deutsche Wohnen”, which indirectly owns approximately 163,000 residential units and 3,000 commercial units, is appealing, among other things, a fine of more than EUR 14 million imposed on it for keeping tenants' personal data longer than necessary.

The Decision of the European Court of Justice

The Court has ruled that a data controller can only be fined for a breach of the GDPR if the breach was culpable, i.e. intentional or negligent. This is the case if the controller could not have been unaware of the unlawfulness of its conduct.

If the responsible party is a legal entity, it is not necessary that the breach was committed by or known to its governing body. Rather, a legal person is liable for infringements committed by its representatives, employees or managers, as well as for infringements committed by any other person acting on its behalf in the course of their business activities.

Finally, where the addressee is an undertaking or belongs to an undertaking, the authority must base its assessment of the fine on the concept of "undertaking" in competition law. The maximum amount of the fine should therefore be calculated based on a percentage of the total worldwide annual turnover of the undertaking concerned in the preceding business year.

Hiring a personal assistant for a severely disabled person of the same age = age discrimination?

07.12.2023

- C-518/22 -

The employment of a personal assistant to assist a person with a disability in his or her daily activities may be reserved for persons of the same age. The resulting difference in treatment based on age can be justified by the nature of the personal assistance services provided.

This was recently decided by the ECJ.
- Communicated by press release of 07 December 2023 -

Facts

AP Assistenzprofis is a German company that specializes in assistance and advisory services for people with disabilities. In 2018, it was looking for personal assistants to support a 28-year-old student in all areas of her everyday life. According to the advertisement, the people sought should "preferably be between 18 and 30 years old".

A rejected applicant who did not belong to this age group felt discriminated against because of her age.

The German Federal Labour Court would like to know from the Court of Justice to what extent, on the one hand, protection against age discrimination and, on the other, protection against discrimination on the grounds of disability could be reconciled in such a situation.

The Decision of the European Court of Justice

In its judgment, the Court emphasizes that the preference expressed by a person with a disability for personal assistants of a certain age is likely to promote respect for his or her right to self-determination.

In the present case, the German legislation expressly requires that the individual wishes of persons with disabilities be taken into account in the provision of personal assistance services. Consequently, the persons concerned must be able to decide how, where and with whom they live.

In this context, it is reasonable to expect that a personal assistant who is of the same age as the person with a disability will fit more easily into his or her personal, social and educational environment. An age requirement may therefore be necessary and justified to protect the right to self-determination of the person with a disability concerned.

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		
Compensation under the AGG **Protestant church as part of the public administration?**	25.01.2024 - 8 AZR 318/22 -	The Federal Labour Court has to decide in the context of a claim for compensation pursuant to Sec. 15 (2) of the German Equal Treatment Act (AGG), whether the Evangelical Church is to be regarded as part of the public administration. The defendant, a corporation under public law, is a district of the Evangelical Church. The severely disabled plaintiff applied for a position advertised by the defendant church district, citing his severe disability. The defendant rejected the plaintiff's application without first inviting him for an interview. The plaintiff's claim is for damages pursuant to Sec. 15 (2) AGG. He is of the opinion that the defendant is a public employer. Therefore, the established case law of the Federal Labour Court, according to which a public employer's violation of the obligation to invite a severely disabled applicant to an interview pursuant to Sec. 165 sentence 3 of the German Social Code, Book IX (SGB IX), regularly leads to the presumption of discrimination on the basis of severe disability, also applies to the defendant. The defendant was not part of the state administration. What is decisive, however, is that the defendant is recognized by the state as a legal entity and acts as such to the outside world. Like all church associations under public law, the defendant enjoys certain rights similar to those of the State as a corporation under public law, such as the right to levy taxes from its members and the status of employer. Consequently, it should also be treated as a public employer. The equality provision at issue in Sec. 165 sentence 3 SGB IX can be regarded as an expression of

		Christian ideas and therefore does not conflict with the churches' constitutionally guaranteed right to self-determination. The lower courts rejected the claim. With his appeal, the plaintiff continues to pursue his claim.
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**	30.01.2024 - 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.

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
Ability to call in sick by phone once again	07.12.2023	According to a decision of the Federal Joint Committee, it is now possible to determine incapacity for work by telephone if the patient is already known to the doctor's practice. It is not possible to issue a sick note by telephone if the symptoms are severe or if the illness diagnosed by telephone persists. However, the insured person is not entitled to an anamnesis and disability assessment by telephone.

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