GÖRG

YOUR BUSINESS LAW FIRM

Employment Tracker

MAY 2024

GÖRG

YOUR BUSINESS LAW FIRM

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.

Never Far Away – Our Offices

BERLIN
T: +49 30 884503-0
berlin@goerg.de

HAMBURG
T: +49 40 500360-0
hamburg@goerg.de

FRANKFURT AM MAIN
T: +49 69 170000-17
frankfurt@goerg.de

COLOGNE
T: +49 221 33660-0
koeln@goerg.de

MUNICH
T: +49 89 3090667-0
muenchen@goerg.de

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		
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**	13.12.2023 - 1 ABR 28/22 -	**An employer who conducts the application process for an advertised position digitally using a software program fulfils its obligation to submit the application documents to the works council if it grants its members the right to inspect and take notes on the application documents stored in the program for the duration of the approval procedure pursuant to Sec. 99 (1) of the German Works Constitution Act (BetrVG) - which can be used at any time with the aid of laptops provided.** *This was decided by the Federal Labour Court in December last year and the reasons for the decision were recently published.* Facts of the case 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 decision of the Federal Labour Court

The Federal Labour Court has ruled that the employer does not necessarily have to provide the required application documents in paper form in order to fulfil the obligation under Sec. 99 (1) Sentence 1 BetrVG. Rather, the interpretation of Sec. 99 (1) Sentence 1 BetrVG, shows that a right to inspect the application documents stored in a software program is sufficient.

Data protection considerations would not stand in the way of such a digital right of inspection. In the present case, the works council's digital right of inspection is limited to those documents that would have had to be made available to the works council in this form if they were physically available. The data processing contained therein is permitted pursuant to Art. 6 (1) subpara. 1 lit. c and (3) GDPR in connection with Sec. 26 (1) sentence 1 BDSG, as it serves to fulfil an obligation of the employer pursuant to Sec. 99 (1) sentence 1 BetrVG.

Entitlement to payment of a social plan settlement

Admissibility of Excluding Fixed-Term Employees from the Scope of a Severance Plan

30.01.2024

- 1 AZR 62/23 -

The exclusion of temporary employees from the scope of a social compensation plan is not inadmissible due to a violation of the prohibition of discrimination pursuant to Sec. 4 (2) Sentence 1Part-Time and of the Fixed-Term Employment Act (TzBfG).

*This was decided by the Federal Labour Court in January of this year and the reasons for the decision were recently published***.**

Facts of the case

A dispute arose as to whether the plaintiff was entitled to a severance payment under a severance plan, even though fixed-term employees - such as the plaintiff - are excluded from the scope of the severance plan.

The plaintiff was employed by the defendant employer as an aircraft fueler for a fixed term. Due to the planned closure of the defendant's plant, the defendant entered into a reconciliation of interests and a social compensation plan with the defendant's works council. Employees with fixed-term contracts were excluded from the scope of the social plan.

According to the plaintiff, he is entitled to payment of a social plan settlement. The exclusion of fixed-term employees violated the prohibition of discrimination in Sec. 4 (2) TzBfG, and was therefore invalid.

The decision of the Federal Labour Court

The Federal Labour Court ruled in favour of the defendant employer and held that the plaintiff was not entitled to the requested social plan settlement.

The Federal Labour Court based its decision primarily on the fact that the cut-off date provision contained in the social plan did not raise any legal concerns. The exclusion of fixed-term employees from the scope of a social plan is permissible because the differentiation is objectively justified. It was in line with the purpose of the social plan and did not - indirectly - violate the prohibition of discrimination against fixed-term employees under Sec. 4 (2) Sentence 1 TzBfG. The social plan serves to compensate or mitigate such economic disadvantages resulting from the planned operational change. The parties to the agreement were entitled to assume that the employees who entered into an employment relationship with

		the defendant after the date of the planned plant closure would not suffer any economic disadvantages to be compensated by the social plan.
Works Council election **Fewer candidates than works council seats**	24.04.2024 - 7 ABR 26/23 -	**If fewer employees apply for a seat on the works council than there are works council members to be elected, a "smaller" works council can be formed.** *This was decided by the 7th Senate of the Federal Labour Court.* Facts of the case The employer runs a clinic which generally has 170 employees. For this size of company, the staggering of Sec. 9 BetrVG provides for a works council consisting of seven members. In the works council election initiated in the spring of 2022, only three female employees stood as candidates and a works council with three members was elected. The employer considered the election null and void and sought a declaration to that effect from the labour court. The lower courts disagreed and declared the election valid. The decision of the Federal Labour Court The employer's appeal against this decision was unsuccessful before the 7th Senate of the Federal Labour Court. It does not prevent the election of a works council if there are not enough candidates for the works council office. This follows above all from the intention of the legislator expressed in Sec. 1 (1) Sentence 1 BetrVG, according to which works councils are to be elected in companies with, as a rule, at least five employees with permanent voting rights, three of whom are eligible to be elected. With regard to the size of the works council, if there are fewer candidates than seats to be filled, the next lower level of Sec. 9 BetrVG must be used until the number of candidates is sufficient to form a body with an uneven number of members.

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		
Limitation of the employer's assumption of the employee's pension insurance contributions to the hiring age of 45 in church labour law regulations as age discrimination?	23.05.2024 - 6 AZR 155/23 -	The Federal Labour Court decides whether the defendant employer must pay the employee's pension insurance contributions for the plaintiff. In this context, it is particularly disputed whether the provision contained in the church's employment contract guidelines, according to which the employer's assumption of the employee's pension insurance contributions is limited to the hiring age of 45, is permissible. The teacher, who works for the defendant as a secondary school teacher, entered the profession as a so-called lateral entrant at the age of 49. According to the employment contract guidelines of the Bavarian archdioceses relevant to the employment relationship, including the special regulations for salaried teachers contained therein, the school authority only pays the employee contributions to the statutory pension insurance scheme if the employee is hired up to the age of 45. The plaintiff is seeking reimbursement of the employee contributions he made to the statutory pension insurance scheme in the years 2018 to 2021 and a declaration that the defendant is obliged to pay the plaintiff's employee contributions to the pension insurance scheme. He is of the opinion that the age restriction contained in the provisions at issue for the assumption of employee contributions to the statutory pension insurance constitutes unlawful discrimination on the grounds of age. The defendant is of the opinion that it does not have to pay the employee contributions to the statutory pension insurance scheme due to the age of the plaintiff when he was hired.

		The lower courts dismissed the claim. With his appeal to the Federal Labour Court, the plaintiff is seeking payment of the employee contributions claimed.
Offsetting periods of ordered quarantine against approved annual leave	28.05.2024 - 9 AZR 76/22 -	It is disputed whether the plaintiff is entitled to have 8 days of leave credited to his leave account. In this context, it is particularly questionable whether the entitlement to paid annual leave is fulfilled if domestic quarantine is ordered by the competent authority for the leave period already determined by leave approval due to suspected infection with the coronavirus. After the defendant employer had approved the leave requested by the plaintiff, the city of Hagen ordered the plaintiff to quarantine at home because he had been in contact with a person infected with the coronavirus. For the duration of the quarantine, the plaintiff was prohibited from leaving his home and receiving visits from people outside his household without the express consent of the public health department. The defendant debited the plaintiff's vacation account with eight days and paid him the vacation pay. The plaintiff is now requesting that the vacation days be credited back to his vacation account because he was not able to take his vacation as he wished. The situation in the event of a quarantine order is comparable to that resulting from an incapacity to work due to illness. The employer must therefore grant him additional leave in accordance with Section 9 Federal Vacation Act (BUrlG), according to which medically certified periods of illness during leave may not be counted towards annual leave. The lower courts dismissed the claim. As part of the appeal proceedings, the Federal Labour Court had referred questions on the interpretation of the Working Time Directive to the Court of Justice of the European Union, but withdrew the referral due to a decision by the Court of Justice in a similar case in the meantime. The Federal Labour Court will now decide in light of the Court's decision (C-206/22).

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
Reform of the law on temporary academic contracts (WissZeitVG)	27.03.2024	On March 27, 2024, the Federal Cabinet approved the reform of the Academic Fixed-Term Contract Act. The central approach of the reform is to focus even more on qualification than before and to create more reliability, predictability and transparency. ▪ The basic system of the "WissZeitVG" - on the one hand, the qualification time limit with renewals and, on the other, the third-party funding time limit - is to be retained. ▪ However, the relationship between qualification and third-party funding time limits is to be readjusted. Central elements of the reform are the introduction of minimum contract durations, the binding priority of fixed-term contracts for qualification, the improvement of work-life balance and an earlier decision on a permanent perspective in science.
Federal Ministry of Labour and Social Affairs publishes digitization strategy for labour and social administration	22.04.2024	On 22 April 2024, the Federal Ministry of Labour and Social Affairs (BMAS) published the digitalization strategy for employment and social administration. With 60 concrete measures, the BMAS and seven other authorities and agencies will further digitalize their processes, automate them as far as possible and thus facilitate access to benefits and support services for people and companies. This will involve increased cross-agency cooperation and the creation of a digital-friendly culture of transformation and innovation.

Local presence: your contacts

Dr. Ulrich Fülbier

Head of labour and employment law
Prinzregentenstrasse 22
80538 Munich
P: +49 89 3090667 62
ufuelbier@goerg.de

Dr. Thomas Bezani

Partner
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 544
tbezani@goerg.de

Dr. Axel Dahms

Partner
Kantstrasse 164
10623 Berlin
P: +49 30 884503 122
adahms@goerg.de

Burkhard Fabritius, MBA

Partner
Alter Wall 20 – 22
20457 Hamburg
P: +49 40 500360 755
bfabritius@goerg.de

Dr. Dirk Freihube

Partner
Ulmenstrasse 30
60325 Frankfurt am Main
P: +49 69 170000 159
dfreihube@goerg.de

Dr. Ralf Hottgenroth

Partner
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 504
rhottgenroth@goerg.de

Dr. Martin Hörtz

Partner
Ulmenstrasse 30
60325 Frankfurt am Main
P: +49 69 170000 165
mhoertz@goerg.de

Dr. Alexander Insam, M.A.

Partner
Ulmenstrasse 30
60325 Frankfurt am Main
P: +49 69 170000 160
ainsam@goerg.de

Dr. Christoph J. Müller

Partner
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 524
cmueller@goerg.de

Dr. Lars Nevian

Partner
Ulmenstrasse 30
60325 Frankfurt am Main
P: +49 69 170000 210
lnevian@goerg.de

Dr. Marcus Richter

Partner
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 534
mrichter@goerg.de

Dr. Frank Wilke

Partner
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 508
fwilke@goerg.de

Dr. Hanna Jansen

Counsel
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 534
hjansen@goerg.de

Pia Pracht

Counsel
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 524
ppracht@goerg.de

Jens Völksen

Counsel
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 504
jvoelksen@goerg.de

Rolf-Alexander Markgraf

Assoziierter Partner
Alter Wall 20 – 22
20457 Hamburg
P: +49 40 500360 755
rmarkgraf@goerg.de

Phillip Raszawitz

Assoziierter Partner
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 544
praszawitz@goerg.de

Meganush Schiller

Assoziierte Partnerin
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 534
mschiller@goerg.de

Sebastian Schäfer

Assoziierter Partner
Kennedyplatz 2
50679 Cologne
P: +49 221 33660 534
sebschaefer@goerg.de