

Legal Update Labour and Employment

A „Use By“ date for Annual Leave Entitlements

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We reported in our previous Newsletter (Newsletter 3/2011) on the Opinion of the Advocate-General of the European Court of Justice in the „Schulte“ case. Meanwhile, on 22 November 2011, the ECJ handed down its decision in which it corrected its previous case law on the accumulation of annual leave entitlements in the case of long-term incapacity for work in the manner desired by employers. The ECJ made clear that leave entitlements might also extinguish in the case of long-term incapacity for work if these could previously have been carried over during a reasonable period of 15 months.

It is thus now possible under European law to restrict the unlimited accumulation of leave entitlements such that they lapse 15 months after the expiry of the leave year. If no collective agreement to this effect exists, then this should be agreed with employees in their employment contracts.

However, the Baden-Württemberg Higher Labor Court recently decided in a first reaction from the German courts that the lapsing of leave entitlements in the case

of illness-related absence from work over a longer period should apply directly under German leave entitlement law (Judgment of 21 December 2011 (10 Sa 19/11)). In the Higher Labor Court's opinion, leave entitlements should lapse even without express agreement, i.e. automatically, at the latest 15 months after the leave year expires.

The decision of the Baden-Württemberg Higher Labor Court is certainly to be welcomed, but nonetheless from a legal point of view surprising. Up to this point, German leave entitlement law, which is regulated by statute, has not provided for a 15-month carryover period of such kind. Nor does the wording of the legislation support this interpretation. It is thus doubtful whether the desirable result achieved by the Higher Labor Court will ultimately be upheld by the court of highest instance, the Federal Labor Court. Thus in order to make sure that leave entitlements cannot be accumulated without limitation, it would thus be advisable for employers to provide for a carryover period in their standard employment contracts and to make the necessary amendments to existing employment contracts. In the event that the Federal

Labor Court does not share the Baden-Württemberg Higher Labor Court's opinion, employees who are ill over a longer period of time could potentially continue to be able to accumulate leave entitlements without limitation.



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