

Limitation Periods and the Minimum Wage

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In a recently published decision (Ref. 5 AZR 703/15), the Federal Labour Court questioned the validity of limitation periods and limitation clauses in employment contracts in connection with the minimum wage in the nursing sector.

Decision

In its decision of 24 August 2016 (Ref. 5 AZR 703/15), the Federal Labour Court addressed the validity of a limitation period in an employment contract from the nursing sector.

The underlying case involved a dispute over a limitation period in an employment contract with a typical formulation that made provision for the extinguishable of all claims between the parties not brought in writing within the three months following the respective dates of accrual.

The Federal Labour Court considered this limitation clause invalid, reasoning that by virtue of its all-encompassing formulation the limitation would also have to be construed to refer to the right to receive the minimum wage pursuant to the Nursing Care Conditions Regulation (*Pflegearbeitsbedingungenverordnung – PflegeArbbV*). According to § 9 sent. 3 of the Posted Workers Act (*Arbeitnehmer-Entsendegesetz – AEntG*), however, the minimum wage can be waived only under a generally applicable collective agreement or in a 'minimum wage regulation'. Accordingly, any waiver of such right in an employment contract would not be permissible.

The Federal Labour Court therefore considered the limitation clause, which covered all rights of the parties, to be in violation of the transparency requirement contained in § 307(1) sent. 2 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*); the exhaustive for-

mulation of the limitation clause conveys the erroneous impression that it is also possible to waive the right to receive the minimum wage mandated under the Nursing Care Conditions Regulation in an employment contract. However, the court found that this would not be consistent with § 9 sent. 3 of the Posted Workers Act, which prohibits limitation periods in connection with claims arising from § 2 of the Nursing Care Conditions Regulation in employment contracts.

As a result, the Federal Labour Court ruled that the entire limitation clause was invalid and rejected the possibility of enforcement of the clause in respect of other claims.

Implications for practice

The decision directly concerned only the minimum wage called for in the Nursing Care Conditions Regulation. At the practical level, the question then arises as to whether the decision also applies to the right to the minimum under the Minimum Wage Act (*Mindestlohngesetz – MiLoG*), which would mean that limitation clauses are consistently invalid unless provision is expressly made for an exception in the case of the right to receive a minimum wage under the Minimum Wage Act.

The grounds for the decision do, however, make it clear that the decision cannot be applied to the general minimum wage pursuant to the Minimum Wage Act. The Federal Labour Court explicitly makes a distinction between the minimum wage in the nursing sector (§ 9 sent. 3 of the Posted Workers Act, § 2 of the Nursing Care Conditions Regulation) and the general minimum wage in effect otherwise (§ 3 sent. 1 of the Minimum Wage Act).

The way § 3 sent. 1 of the Minimum Wage Act is worded speaks against complete invalidity of limitation clauses.

Legal Update

According to this provision, agreements that exclude the minimum wage called for under the Minimum Wage Act are invalid, but only in respect of that specific aspect. This makes it clear that the legislature deliberately wanted to avoid the rejection of limitation clauses in their entirety, but only any part thereof that concerned the right to receive the minimum wage.

The Federal Labour Court also makes mention of this and emphasizes in an obiter dictum that the prevailing opinion in the literature advocates construction of limitation clauses in employment agreements to ignore the invalid component and retain the remainder due to the way the word 'insofar' is used in § 3 sent. 1 of the Minimum Wage Act.

The decision of the Federal Labour Court is therefore not generally applicable; it can be applied only insofar as § 9 sent. 3 of the Posted Workers Act applies, i.e., exclusively within the sphere of operation of the Posted Workers Act and in sectors subject to regulations pursuant to the Posted Workers Act (e.g., construction, roofing and painting trades, security services, waste industry, hairdressers).

It is therefore recommended that employers in the nursing sector and sectors covered by the Posted Workers Act revise limitation clauses and time bars in their employment contracts and expressly waive application to claims to payment of the minimum wage.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Josef Toma on 030 - 884 503 214 or by email to jtoma@goerg.de. For further information about the author visit our website www.goerg.com.

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