

## Summertime, vacation time – Do employers have the right to call employees back to work during vacation?

Pia Pracht

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### Problem

Personnel shortages regularly occur during the summer vacation period due to the increase in the number of employees who take their paid annual leave during the summer months. Employers are often faced with the problem of finding ways to handle work in order to avoid production shutdowns or claims for damages by customers due to failure to keep deadlines. This problem can obviously be minimized through careful planning in advance on the part of the employer, but even the best of plans will quickly prove futile in the case of unforeseen events such as, for example, unusually high health-related absenteeism or an unexpectedly high volume of incoming orders. In such situations, many employers consider it only natural to call employees who are on vacation back to work. This is, however, not always consistent with what is actually allowed by law.

### Implications for practice

#### No right to call employees back to work

Once an employee's vacation has been approved, it cannot be unilaterally cancelled. Neither the Federal Holidays Act (*Bundesurlaubsgesetz – BUrlG*) nor the duty of loyalty implicit in employment contracts in any way obligates an employee to interrupt his or her vacation. The law also does not allow any agreement that enables an employer to cancel vacation already approved.

#### Emergencies

According to the Federal Labour Court, employers do have the right to cancel the vacation of employees that has already been approved in emergencies under exceptional circumstances. However, this is possible only in the case of urgent necessity if no other alternative is possible. The Federal Labour Court has, however, not up to now provided a precise definition of what would constitute such an "emergency". Neither an unexpectedly strong increase in business nor unusually high health-

related absenteeism will normally suffice to constitute an emergency within the meaning of the case law in the absence of other extenuating circumstances.

#### Right to cancel vacation in the case of contractually agreed extra vacation

In the case of additional vacation in excess of the legally prescribed minimum, the case law would on the other hand seem to allow employment agreements that give employers the right to cancel such additional vacation. According to the Federal Labor Court, employers are free to make additional vacation contingent on any conditions they prefer. The concrete formulation of the corresponding clause in the employment agreement must, however, make a clear-cut distinction between the legally prescribed minimum vacation and any additional vacation granted voluntarily by the employer in order to ensure the validity of the clause permitting cancellation in respect of the additional vacation. It is also recommended that it be made clear in each case whether vacation taken is to be counted toward the legally stipulated minimum vacation or the additional vacation granted under the employment contract.

### Conclusions

Employee vacations should be planned very carefully and if possible provision made for sufficient reserve personnel since it will regularly not be possible to cancel vacation and call personnel back to work. It is, however, possible to enter into voluntary agreements with employees that provide incentives to agree to curtail vacation time and return to work if necessary (e.g., covering of cancellation costs, additional compensation). In such cases, it is only necessary to keep in mind that approved vacation that is interrupted and not used as planned may not be allowed to lapse altogether. Vacation that is voluntarily interrupted must be granted at a later date.

# Legal Update

## 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 Pia Pracht on +49 221 33660-524 or by email to ppracht@goerg.de. For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

## Our offices

GÖRG Partnerschaft von Rechtsanwälten mbB

### BERLIN

Klingelhöferstraße 5, 10785 Berlin  
Phone +49 30 884503-0, Fax +49 30 882715-0

### COLOGNE

Kennedyplatz 2, 50679 Köln  
Phone +49 221 33660-0, Fax +49 221 33660-80

### ESSEN

Alfredstraße 220, 45131 Essen  
Phone +49 201 38444-0, Fax +49 201 38444-20

### FRANKFURT AM MAIN

Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main  
Phone +49 69 170000-17, Fax +49 69 170000-27

### HAMBURG

Dammtorstraße 12, 20354 Hamburg  
Phone +49 40 500360-0, Fax +49 40 500360-99

### MUNICH

Prinzregentenstraße 22, 80538 München  
Phone +49 89 3090667-0, Fax +49 89 3090667-90