

## Retroactive Reduction of Paid Annual Leave due to Parental Leave?

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### Decision

§ 17(1) sent. 1 of the Federal Parent Allowance and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz – BEEG) allows employers to reduce paid annual leave by one-twelfth for each full calendar month of parental leave taken in the same year. The Federal Labor Court's decision of 19 May 2015 (Ref.: 9 AZR 725/13) addressed the question as to whether this also applies retroactively, i.e., after termination of the employment relationship, which is the subject of dispute in the case law and the scholarly literature.

The plaintiff had been employed by the defendant since 2007. The plaintiff went on parental leave in 2010, and the parties terminated the employment relationship in the year 2012 prior to the planned end of the period of parental leave. The plaintiff's initial attempt to claim outstanding annual leave without resorting to the courts was unsuccessful. When the plaintiff finally filed an action, the defendant announced his intention to reduce the paid annual leave due the plaintiff by one-twelfth for each full calendar month of parental leave taken.

The Hamm Higher Labor Court (27 June 2013, Ref.: 16 Sa 51/13) granted the plaintiff's claim after the Labor Court Hamm had denied it. The Federal Labor Court confirmed the judgment of the court of appeal. The Senate was of the opinion that an employer must announce his intention to reduce paid annual leave due to parental leave while the employment relationship is still intact, arguing that compensation due upon termination of an employment relationship is not the equivalent of paid leave, but an independent pecuniary right. As soon

as such a right comes into being, there can no longer be any right to paid leave, which means it cannot be reduced.

### Implications for practice

This decision is a logical extension of the case law of the Federal Labor Court after it explicitly completely abandoned what was referred to as the surrogate theory in its judgment of 19 June 2012 (Ref. 9 AZR 652/10). Previously, compensation due pursuant to § 7(4) of the Federal Holiday Act (Bundesurlaubsgesetz – BUrlG) was subject to the same provisions as the underlying annual leave, in particular as regards time bars.

An employer who wants to reduce an employee's paid annual leave on the basis of parental leave taken must therefore make sure he exercises this right to make such a reduction at the very latest during the period of notice or prior to entry into force and effect of a termination agreement.

Since the Federal Labor Court disallowed any such reduction in the case of the decision at issue here, the Court did not have to address the question as to whether the employer's right to make the reduction pursuant to § 17(1) sent. 1 of the Federal Parent Allowance and Parental Leave Act is compatible with EU law. This question – which the court of first instance answered in the positive – therefore remains to be clarified by the higher courts. As a result, employers are faced with a not insignificant degree of legal uncertainty in this regard.

# 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 Hagen Strippelmann on +49 221 33660-503 or by email to [hstrippelmann@goerg.de](mailto:hstrippelmann@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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