

Legal Update

Labour and employment

Employers May at Any Time Introduce a Requirement for Immediate Presentation of Medical Certificates in the Case of Illness

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An employer that decides to exercise the legal right to require that an employee submit a medical certificate on the very first day of illness is not bound to any special conditions (Federal Labor Court, judgment of 14 November 2012 – 5 AZR 886/11).

Facts

The plaintiff, who is employed as an editor by the defendant, a radio station, submitted an application for business travel to her superior for 30 November 2010 that was not approved. On 29 November 2010, the plaintiff then submitted another request for approval of business travel on the following day. This request was also not approved. On the day of the planned business trip, the plaintiff failed to appear for work and called in sick and then reported for work again the following working day, 1 December 2010, at which time the defendant instructed the plaintiff to see a physician on the first day of any future absence due to illness and present a physician's certificate. The plaintiff brought an action

against the defendant, alleging that the defendant's instructions were not objectively warranted and that objective grounds were required for such instructions. The plaintiff also submitted that the collective agreement covering her employment relationship made no provision for requiring submission of a medical certificate on the very first day of absence for reasons of illness.

Decision

The Federal Labor Court dismissed the action, as had the lower courts. The Federal Labor Court made it clear that, according to the third sentence of section 5(1) of the Continuation of Remuneration Act (Entgeltfortzahlungsgesetz – EFZG), an employer is free to require at any time that an employee present the proper certificate on the first day of any future illness-related absence. The court ruled that the exercise of the employer's discretionary rights in this regard is not contingent upon compliance with any special conditions. In particular, the court continued, the employer need not

have objective reason to suspect that the employee has simulated illness in the past.

The court also pointed out that it is to be sure possible to exclude the employer's option pursuant to the third sentence of section 5(1) of the Continuation of Remuneration Act under a collective agreement, but the absence of any such clause does not make it possible to conclude that the parties to the collective agreement contemplated any understanding other than that provided by law.

Comments

The decision of the Federal Labor Court is to be welcomed in that it is consistent with the straightforward wording of the provision contained in the third sentence of section 5(1) of the Continuation of Remuneration Act and thereby confirms the prevailing opinion and current practice held within companies. The assumption to the effect that special conditions must be met before an employer can require presentation of a medical certificate on the first day of any future absence due to illness is neither grounded in law, nor is there any objective need for such a provision. The court of first instance, in this case the Cologne Higher Labor Court, even went so far as to state that the right of the employer pursuant to the third sentence of section 5(1) of the Continuation of Remuneration Act need not even meet the standard of reasonable discretion pursuant to section 106 of the Trade and Industry Code (Gewerbeordnung – GewO) (Cologne Higher Labor Court, judgment of 14 Septem-

ber 2011 – 3 Sa 597/11). This conflicts with the prevailing opinion found in the literature on labor law.

The decision of the Federal Labor Court is encouraging for practitioners because of the legal certainty it provides with respect to dealing with requests for presentation of medical certificates on the very first day of absence from work due to illness. Employers must neither justify their decision to employee nor satisfy any conditions in terms of objectivity. It is, however, necessary to keep in mind that any request by an employer must not be manifestly abusive or discriminatory. If for example, an employer requires that only female employees present medical certificates immediately, that would qualify as discrimination within the meaning of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) and not only make the measure invalid, but could also result in claims for damages, including damages for pain and suffering. It is also necessary to keep in mind that a general requirement to the effect that everyone employed by an undertaking must present a medical certificate on the first day of any illness-related absence affects orderly operation of the undertaking as a whole and is therefore subject to co-determination pursuant to no. 1 of section 87(1) of the Works Constitution Act. It can also be expected that exclusion of the right of employers pursuant to the third sentence of section 5(1) of the Continuation of Remuneration Act will in the future assume greater importance in the context of collective bargaining negotiations.

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 himself: Felix Pott +49 221 33660-524 or fpott@goerg.de. For further information about the author visit our website www.goerg.com.

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