01 | 2019

NEWSLETTER

GÖRG

YOUR BUSINESS LAWYERS

LABOUR AND EMPLOYMENT LAW

INTRODUCTION

The first newsletter for 2019 provides a brief overview of new legal regulations that are of interest for employers. We will also address the decision made by the European Court of Justice regarding the expiry of residual leave claims, which is highly relevant for practice, as well as the ruling of the Federal Labour Court regarding how to handle business travel time, both of which have attracted considerable attention. We will also explain the changes planned regarding termination protection for bankers. Another column addresses the new legal situation with respect to fixed-term contracts without substantive grounds.

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A New Year – New Labour Laws

Labour law is undergoing many transformations, not least because of rapid changes to the working world in the digital age. The year 2019 has some new developments in store for employers:

Temporary part-time employment

As of 1 January 2019, employees have a right to temporarily switch to part-time work, accompanied by a right to return to their previous working hours, known as temporary part-time employment. Employees who have been working for at least six months at a company with at least 45 salaried employees can now request to reduce their working hours for a specified period ranging from one year up to five years. The employer can deny the employee's request to reduce his or her working hours if this is opposed by commercial reasons or if a large number of the employee's colleagues are already engaged in temporary part-time employment.

Tax breaks for company cars

In the future, electric and hybrid company cars that may also be used privately will now incur a tax of merely 0.5% of the gross list price rather than 1%. This new regulation applies for electric and hybrid vehicles that are acquired or leased within the period from 1 January 2019 to 31 December 2021.

Company bicycles, which are enjoying increased popularity and were previously taxed according to the 1% regulation along with company cars, will now be tax-exempt starting from January 2019, as long as the company bicycle is not granted as deferred compensation, but rather in addition to the employee's salary.

Job tickets are once again tax-exempt starting from January 2019. However, the tax-exempt job ticket will reduce the deductible amount for commuting allowance on tax returns.

Contributions to statutory health insurance

Starting in January 2019, employers and employees will once again share contributions for statutory health insurance equally. This applies not only for the general contribution rate, as was the case previously, but also for the individual additional health insurance premium which was formerly paid by employees alone.

Qualification Opportunities Act

The Qualification Opportunities Act intends to support continuing education in the face of rapid changes to the working world in the digital age.

In the future, the Employment Agency will bear some of the costs for continuing education that is conducted outside of the company and amounts to at least 160 hours. However, subsidies from the Employment Agency require

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the employer to share an appropriate amount of the costs for continuing education, staggered based on the size of the company (e.g. the employer must assume at least 50 percent of the costs in companies with ten to 250 employees).

Draft legislation for improved protection of business secrets

In 2019, it is anticipated that a law will be passed providing improved protection of business secrets. This is intended to implement the corresponding EU directive. The purpose of the law is to improve the protection of secrets on the one hand, in particular by establishing new foundations for cease and desist or compensation claims, as well as protection of whistleblowers on the other hand.

Statutory minimum wage

The statutory minimum wage has increased this year as well, from €8.84 to €9.19 per hour.

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The Fate of Residual Leave Time – Current ECJ Case Law

Previous legal situation

The Federal Leave Act (Bundesurlaubsgesetz, BUrlG) stipulates that leave time needs to be taken during the ongoing calendar year as a rule. Leave time will expire no later than the first three months of the calendar year following the year of leave time if not taken during the statutory carry-over period (Section 7 (3) BUrlG). Previously, this meant that leave time would automatically expire if no request for leave was made during the year of leave time or the statutory carry-over period. In contrast, if employees have made a leave request during the year of leave time or the statutory carry-over period, but the employer declined to grant this leave time even though it was possible to do so, the case law of the Federal Labour Court establishes a compensation claim in the form of replacement leave entitlement after the end of the year of leave time or the statutory carry-over period. If leave time can no longer be granted, or can only partially be granted, due to termination of the employment relationship, an exceptional claim to payment in lieu of leave time is established (Section 7 (4) BUrlG). So far so good.

Current ECJ case law

In its rulings from November of last year (Case numbers: C-619/16 and C-684/16), the European Court of Justice (ECJ) did not invalidate the German regulations regarding the expiry of leave time, but it did set additional requirements for the expiry of leave time. According to the ECJ, failure to request leave time alone should not result in the expiry of residual leave entitlements. Instead, the ECJ requires that employers place their employee in a position such that they are able to take actual leave time, that is, by asking them to take leave time during the leave year and promptly and clearly notifying them that their leave time will otherwise expire at the end of the year of leave time or the statutory carry-over period. The employer bears the burden of proof for clarification in this regard. The ECJ based its ruling on the imbalance of power inherent in the employment relationship. Without a corresponding invitation from the employer, employees might shy away from (fully) taking advantage of their leave entitlements, fearing negative impacts to their employment relationship. However, if the employer places an employee in a position such that he or she is able to take actual leave time, and the employee voluntarily waives the right to leave time, this leave time should expire according to the case law of the ECJ as well.

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Relevance for practice

With its judgment on 19 February 2019 (Reference: 9 AZR 541/15), the Federal Labour Court has now implemented the decision of the ECJ. In the future, employers should inform their employees promptly and in writing (burden of proof!) regarding outstanding residual leave entitlements, and request them to take advantage of this leave, making reference to the fact that it will otherwise expire. Otherwise, employers run the risk of potentially facing considerable claims to payment in lieu of leave upon termination of the employment relationship.

Additionally, this new case law regarding residual leave entitlements should be taken as an occasion for reviewing the leave arrangements in employment contracts. It is recommended to always differentiate between legal leave entitlements and additional contractually agreed leave entitlements, since it is generally acknowledged that regulations deviating from the statutory leave provisions can be arranged with respect to additional contractual leave entitlements. For this reason, it is possible to arrange for automatic expiry of additional contractual leave entitlements due to failure to request leave during the leave year. However, if the contractual leave arrangement fails to differentiate between legal leave entitlements and additional contractually agreed leave entitlements, it can be assumed that the legal leave entitlements and additional contractually agreed leave entitlements will be treated in the same manner. Along with the statutory leave provisions, the new case law regarding residual leave entitlements must therefore be applied accordingly.

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Remuneration of Travel Time for Business Trips to Foreign Countries

"Travel time to foreign countries is considered working hours!" This and similar headlines appeared in countless well-known representatives of the press, television and internet in late October. The occasion was the Federal Labour Court's press release regarding its ruling from 17 October 2018. The first sentence of the press release states:

"If the employer temporarily sends the employee abroad for work, the time required for the journey there and back must be remunerated as work."

At first glance, it seems that the Federal Labour Court has established a generally valid principle for handling travel time to foreign countries. However, if you consider the factual circumstances used as a basis and the ruling of the previous instance, it seems doubtful whether this conclusion is accurate.

Principles for the remuneration of travel time

The individual case determines the situation

The question of whether the employer must offer remuneration for travel time has already been the subject of many high court decisions. In principle, in this regard, it must first be reviewed whether the travel activity should even be qualified as work within the meaning of Section 611a BGB. The next step is to ask how the travel time which qualifies as work should be remunerated.

According to established case law, travel and commuting times are only considered as work within the meaning of Section 611a BGB if either (1) the travel activity is a component of the contractually owed performance (as is the case for field employees), or (2) if the business travel was ordered by the employer, (3) the employee was active during the travel itself (driving with personal vehicle) or otherwise had to perform work tasks (e.g. working on a company laptop) or (4) the travel time is expressly labelled as working hours in an employment contract or collective agreement.

If travel time should be classified as work within this definition, it must be remunerated either if this is required by a special regulation under the employment contract or collective agreement, or if the business travel is conducted during the employee's typical working hours. Travel times outside of typical working hours, on the other hand, must be treated as overtime hours. It only needs to be remunerated if there is an expectation of remuneration within the meaning of Section 612 BGB. In this context, an expectation of remuneration is regularly eliminated if the remuneration of the employee in question would exceed the respective income threshold of the statutory pension insurance scheme.

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Previously, the principle applied was that restrictions of leisure time due to travel alone did not establish expectation of remuneration within this definition. For this reason, there is no general principle according to which travel time needs to be remunerated as a rule.

The Ruling of the Federal Labour Court

The decision of the Federal Labour Court (Ruling from 17 October 2018 – 5 AZR 553/17) was based on a construction company which sent a technical employee to a construction site in China. Instead of a direct flight, a flight with a layover in Dubai was booked for the outward and return journey at the request of the employee. This led to a significant increase in travel time.

The construction company remunerated each day of travel with eight working hours, because this corresponded to the employee's typical working hours. In contrast, the employee requested compensation for the entire (extended) travel time. The Federal Labour Court declined to follow either of these approaches and instead decided that the "required" travel time should be remunerated, that is, the travel time which would have been incurred in case of a direct flight.

The decision of the previous instance

Looking at the decision of the previous instance (Rheinland-Pfalz District Court, ruling from 13 July 2017 – 2 Sa 468/16) rather than the short press release, it can be inferred that the framework collective agreement for salaried employees and overseers in the construction industries was applied to the employment relationship. This agreement contains a special regulation in Section 7 (4.3) regarding remuneration of time for travel to or from a worksite "not involving a daily commute home":

"In these cases, the employee is entitled to his or her full hourly rate according to the collective agreement without any surcharge for the required travel time." In the case used as a foundation, the remuneration of travel times to China was concretely regulated by the collective agreement.

Relevance for practice

It is doubtful whether the Federal Labour Court was actually establishing a new principle according to which all business travel time to foreign countries needs to be remunerated, as the press release for the decision from 17 October 2018 implies. It is more probable that the Federal Labour Court was merely applying the regulation under the collective agreement used as a foundation in the specific case.

Employers are recommended to regulate compensation of travel time expressly and clearly in employment contracts or collective agreements. If no corresponding regulations exist and employees request full compensation for travel times to foreign countries, referencing the latest reports in the press, internet and television, these claims should only be attended to in line with the principles of case law outlined here. If the claims exceed this amount, it is preferable to wait for the full publication of the ruling from 17 October 2018.

The intriguing further question of whether a contractual waiver of the remuneration obligation is admissible will also have to wait for publication of the grounds for the ruling before an answer is apparent. However, it is not anticipated that the decision will be relevant for statutory maximum working hours.

ROLF-ALEXANDER MARKGRAF, SARAH STOLLE

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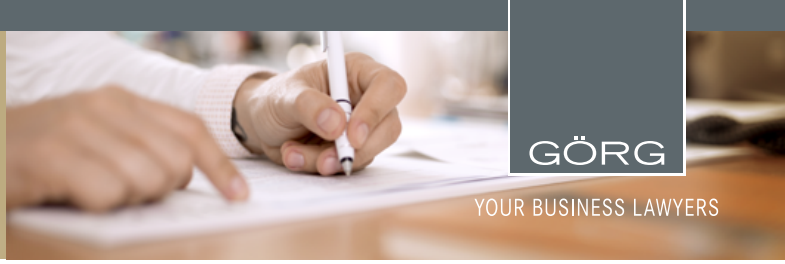

New Draft Legislation: Changes to Termination of Employment Relationships in the Banking Sector

On 20 November 2018, the Ministry of Finance submitted draft legislation for committee review that could change the rules governing the termination of employment relationships in the banking sector, according to various matching media reports.

Introduction

Under the current German law, all employees (with restrictions for executive employees within the meaning of Section 14 KSchG), regardless of their industry and level of remuneration, fall under the Termination Protection Act as long as they have been working in enterprises that regularly employ more than 10 FTEs. Accordingly, the Termination Protection Act also currently applies for highly paid bankers at major financial institutions. The high performance pressure predominant in this industry by nature goes hand in hand with high fluctuation of employees forced by the employer. The flexibility required for banks in this regard is impeded by the strict requirements of the Termination Protection Act, since each termination requires commercial, behavioural or personal reasons for termination.

Even a request to dissolve the employment relationship in exchange for payment of a settlement to be determined by the court pursuant to Section 9 (1) Sentence 2, 10 KSchG only helps in exceptional cases, namely when there are grounds that render continued productive collaboration between the employer and employee untenable. In other words, there must be circumstances in such cases which disturb the relationship of trust between the parties to the employment contract to such a degree that it is practically impossible to continue the working relationship. Under the current laws, the thresholds for such dissolution requests are quite high.

The draft legislation

This is where the new draft legislation from the Ministry of Finance comes in. In principle, it appears that this draft does not intend to change the requirement of stating grounds for termination when declaring a termination. However, when terminating employees, a major financial institution would be given the opportunity of requesting dissolution of the employment relationship without providing reasons.

The draft of the new Section 25a of the Banking Act states that this new regulation would affect employees "whose yearly fixed remuneration exceeds three times the income threshold of the general statutory pension insurance scheme". This currently amounts to EUR 234,000 in Western Germany and EUR 208,800 in the former East German states. For 2019, this threshold is anticipated to equal EUR 241,200 in the former West German states and EUR 221,400 in the former East German states.

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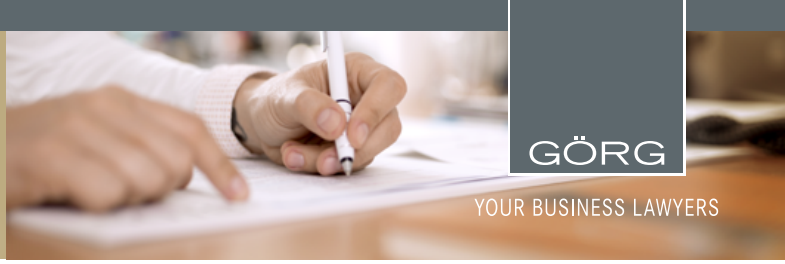

Comments

If the draft legislation is implemented, this will significantly lower the thresholds for terminating highly paid bankers at major financial institutions. Nevertheless, it would be misleading to refer to this change as a loosening of termination protection, as the media has frequently reported. Any application made by an employer to dissolve an employment contract will still require a declaration of ordinary termination, whether under the existing laws or according to the new legal situation. This termination notice must fall outside the normal protections for employees; in other words, it must lack a commercial, behavioural or personal reason for termination, but may not be invalid for other reasons (for instance, violation of special termination protection or similar provisions). Severance will be due under the new draft legislation amounting to as much as 12 average monthly salary instalments for employees under 50, and up to 15 for employees over the age of 50 who have been employed for at least 15 years within the institution, taking into account ancillary benefits such as performance-based bonuses and similar benefits in each case. Severance amounts will still depend on the circumstances of the termination.

If a termination notice were issued without any grounds at all, primarily for the purpose of obtaining an order to dissolve the employment contract, this would likely amount to an abuse of law and the labour courts would take steps to prevent this.

Recommendations

If this draft legislation is adopted, and assuming it is deemed constitutional, the legislation will assist major

financial institutions when terminating employment relationships with highly-paid bankers. These financial institutions, however, are not released from their obligation to review whether termination grounds exist prior to serving termination notice (the key here: abuse of law), nor from their obligation to pay significant severance if a labour court is willing to dissolve the employment contract.

Financial institutions that are covered by the new draft legislation should exercise due legal caution to make use of this potential new option for dissolving employment contracts and minimising severance amounts determined by the court.

DR. HEIKO REITER

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Everything is Different Now – Fixed-Term Contracts without Substantive Grounds

Decision

Anyone who has been following our legal updates about labour law over the past several years will have been amazed about the uncertainty in the way fixed-term contracts without substantive grounds are treated. This was triggered by a ruling of the Federal Labour Court (BAG) in April 2011. Now the Federal Constitutional Court has provisionally ensured legal certainty in two rulings. But first things first:

The law allows fixed-term contracts without substantive grounds up to a duration of two years. However, Section 14 (2) Sentence 2 TzBfG stipulates a so-called pre-employment ban. According to this provision, fixed-term contracts without substantive grounds are not permitted if an employment relationship has "previously" existed with the same employer. Until 2011, it was clear that every employment relationship in the past fell under the pre-employment ban. But the BAG moved away from this view in a very surprising decision from 6 April 2011 (7 AZR 716/09).

Due to constitutional considerations, the term "previously" could not be understood as "at any time in the past", but rather for a period of three years. From the perspective of employment policy, this decision was thoroughly welcome; from a legal standpoint, however, the justification was scarcely tenable.

Accordingly, several district labour courts have subsequently refused to follow the BAG and have remained of the opinion that "previously" must be equivalent to "at any time in the past" (e.g. Baden-Württemberg District Court, 26.9.2013, 6 Sa 28/13).

The legal uncertainty concerning the pre-employment ban ultimately gave rise to multiple constitutional complaints. On 6 June 2018, the Federal Constitutional Court finally

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provided legal certainty (1 BvL 7/14 and 1 BvR 1375/14). Essentially, the Federal Constitutional Court confirmed the constitutionality of the pre-employment ban.

Neither the freedom of vocational choice for job seekers nor the freedom of economic activity for employers are being unconstitutionally harmed. The pre-employment ban serves the purpose of preventing repeat fixed-term employment. The welfare state principle (Art. 20 (1) GG) justifies a restriction of fixed-term employment relationships. At the same time, it gave the Federal Labour Court a clear "lesson" in interpreting the law. In its view, delivering judgments that contradict the clear wording of the law goes beyond the limits of judges' authority to further develop laws. The judicial system must not circumvent the will of the lawmakers. In other words: The BAG may not replace a legal regulation concept ("previously") in favour of an independently developed concept ("at most 3 years").

Relevance for practice

The Federal Constitutional Court clearly showed the 7th Senate of the BAG its limits. Accordingly, courts cannot reverse stipulations under labour law simply based on the justification that they are counterproductive for employment policy.

In this matter, the BAG's ruling from 6 April 2011 was thoroughly appreciated. The 7th Senate had accurately demonstrated that the strict pre-employment ban can have negative consequences for employment policy, including for employees. Therefore, restricting the pre-employment ban to three years was quite reasonable. However, this view was not legally justifiable, since it clearly contradicted the wording of the law, and some district labour courts continued to follow the will of the lawmakers by interpreting the word "previously" to mean "at any time in the past". The Federal Constitutional Court has clarified that this understanding is constitutional, thereby contributing to improved legal certainty. It may be necessary for reasons pertaining to constitutional law, though only in extreme cases, to interpret the pre-employment ban as restrictive. One example is an applicant who had accepted a holiday job in the same company 20 years ago when he was a student. As can be seen from the Federal Labour Court's decision issued early this year, the Federal Labour Court has already implemented the decision of the Federal Constitutional Court (see BAG 23.1.2019 – 7 AZR 733/16).

However, it is possible that this newly obtained legal certainty will only last a short time. In its coalition agreement, the Grand Coalition stated that it would like to restrict fixed-term contracts without substantive grounds (see our last newsletter as well). In the future, employers with more than 75 employees would only be able to hire 2.5% of their workforce on a fixed-term basis without substantive grounds. The duration of such work would also be reduced from 24 to 18 months, and only one extension would now be permitted.

It is likely that our legal update will continue to address the question of fixed-term employment without substantive grounds in the future.

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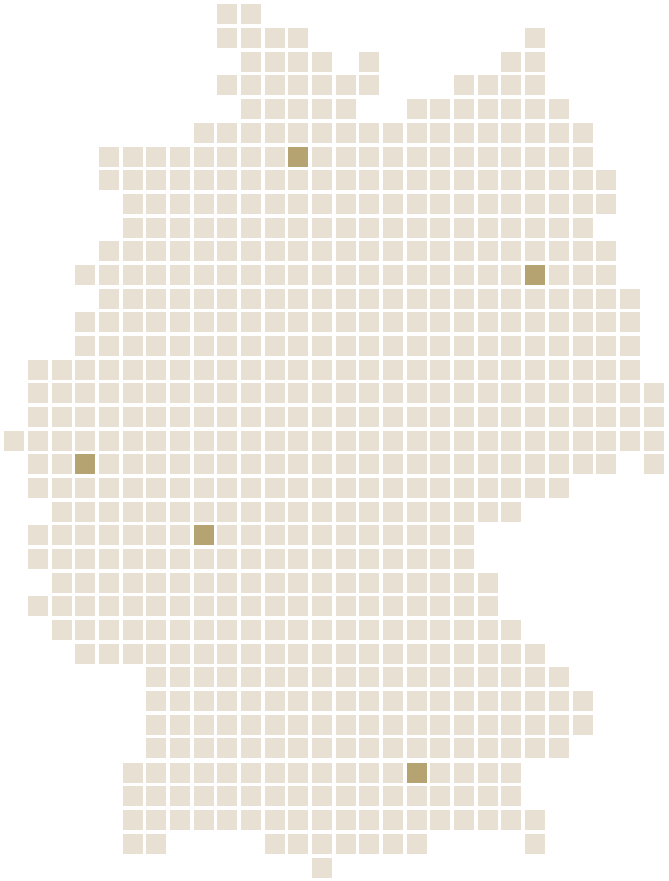

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