Employment Tracker

February 2022

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Stay up to date with us

With our Employment Tracker we regularly look into the "future of labour law" for you! At the beginning of each month we present the most important decisions expected for the month from the Federal Labour Court (BAG) and the European Court of Justice (ECJ) as well as other courts. We report on the results in the issue of the following month. In addition, we point out upcoming milestones in legislative initiatives by politicians, so that you know today what you can expect tomorrow.

Recent decisions

With the following overview of current decisions of the past month, you are informed which legal issues have been decided recently and what impact this may have on legal practice!

Subject	Date/AZ	Remark/ note for the practice
Federal Labour Court		
Entitlement to minimum wage for the period of an internship	19.01.2022 - 5 AZR 217/21 -	**Interns who complete a compulsory internship that is an admission requirement for taking up a course of study under a provision of higher education law are not entitled to the statutory minimum wage.** Facts The Federal Labour Court decided whether a six-month internship entitles the plaintiff to minimum wage. The plaintiff completed a six-month internship on the nursing ward of the defendant clinic. The background to this was that, according to the university's admission regulations, she had to prove that she had completed a six-month nursing internship before beginning her studies.

		At the request of the nursing directorate, the plaintiff submitted a certificate from the university before the start of the internship stating that the planned internship was a mandatory internship for admission to medical school. Accordingly, the plaintiff was not compensated for her work as an intern. The plaintiff is of the opinion that the six-month internship should be remunerated in accordance with the Minimum Wage Act because the internship completed was an orientation for vocational training. Such an internship is only possible for a period of up to three months without remuneration. In addition, she was entitled to pro rata compensation for vacation. Accordingly, the plaintiff's action seeks payment of the minimum wage for the internship and pro rata compensation for vacation. The defendant, on the other hand, is of the opinion that the internship in question was a compulsory internship and that it therefore did not have to pay the minimum wage pursuant to Section 22 (1) sentence 2 of the Minimum Wage Act (*MiLoG*). The lower courts dismissed the action. The Regional Labour Court essentially based its decision on the fact that the internship at issue was to be regarded as a mandatory internship and was therefore not subject to the scope of application of the Minimum Wage Act pursuant to Section 22 (1) Sentence 2 MiLoG. With her appeal to the Federal Labour Court, the plaintiff would still like to achieve that she is awarded the payment of minimum wage. <u>The decision of the Federal Labour Court</u> The plaintiff's appeal against the judgment of the Regional Labour Court dismissing the action was unsuccessful. The Federal Labour Court ruled that the defendant is not obligated to pay the statutory minimum wage pursuant to Sec. 1 in conjunction with Sec. 22 (1) Sentence 2 MiLoG. In its reasoning, the Federal Labour Court states that the plaintiff is not subject to the personal scope of application of the Act. The exclusion of claims to the statutory minimum wage pursuant to Sec. 22 (1) Sentence 2 MiLoG covers, according to the intention of the legislator clearly expressed in the explanatory memorandum to the Act, not only compulsory internships during studies, but also those that are mandatory in

		study regulations as a prerequisite for taking up a certain course of study. The fact that the study regulations were issued by a private university does not contradict this, because this university is state-recognized. As a result, the admission requirement issued by the university is equivalent to a regulation under public law and thus ensures that the internship requirement in the study regulations does not unlawfully circumvent the fundamental entitlement to the statutory minimum wage for interns.
Employee status of a pilot **Applicability of German law**	25.01.2022 - 9 AZR 139/21 -	The date of the judgment was moved to April 12, 2022.
Establishment of an employment relationship due to exceeding the maximum duration of temporary employment pursuant to Sections 9, 10 of the German Temporary Employment Act (AÜG) **Effectiveness of extension of the maximum duration of temporary employment by collective bargaining agreement vis-à-vis non-union members**	26.01.2022 - 4 AZR 26/21 -	The appointment was cancelled.
Mass dismissal **Invalidity of a termination due to breach against the obligation to transmit the notification to the**	27.01.2022 - 6 AZR 155/21 -	**The Sixth Senate of the Federal Labour Court has referred a question to the Court of Justice of the European Union for a preliminary ruling in connection with the question of what sanctions a violation of Section 17 (3) sentence 1 of the German Unfair Dismissals Act (*KSchG*) entails.**

works council to the employment agency from Sec. 17 (3) Sentence 1 Dismissal Protection Act (*KSchG*)		Facts In dispute is another detail of the mass dismissal notification proceedings. According to Sec. 17 (3) sentence, 1 KSchG the employer is obliged to forward a copy of the notification to the works council to initiate the consultation proceedings to the employment agency. The Federal Labour Court has to decide whether it leads to the invalidity of the mass dismissal notification and as a consequence to the invalidity of all mass dismissal terminations if the employer omits to forward the copy to the employment agency. Insolvency proceedings were opened against the employer's assets due to insolvency and over indebtedness. At the same time, the defendant was appointed as insolvency administrator. The insolvency debtor agreed a reconciliation of interests with a list of names and a social plan with the works council set up at the company. The plaintiff - like all other employees - is included on the list of names as an employee to be dismissed. After issuing a mass dismissal notice pursuant to Sec. 17 KSchG, the insolvency debtor gave ordinary notice of termination of the plaintiff's employment. The insolvency debtor did not forward a copy of the notification to the works council pursuant to Sec. 17 (2) KSchG to the Employment Agency, contrary to Sec. 17 (3) sentence 1 KSchG. For this reason, the plaintiff considers the termination to be invalid. The lower courts are of the opinion that the termination in dispute is not invalid due to a breach of the obligation under Section 17 (3) sentence 1 KSchG because it is merely a secondary obligation outside the notification procedure. Accordingly, the lower courts dismissed the action. The plaintiff contests this with his appeal to the Federal Labour Court. The decision of the Federal Labour Court The Federal Labour Court has referred the question to the European Court of Justice within the framework of a preliminary ruling procedure as to the purpose of the duty of notification pursuant to Art. 2 Para. 3 Subpara. 2 of the Mass Dismissal Directive 98/59/EC. The second subparagraph of Art. 2(3) of the Mass Dismissal Directive stipulates that the employer must provide the competent authority with a copy of at

		least the elements of the written notification to the employee representation referred to in subparagraph 1(b)(i) to (v). In the opinion of the Senate, the question referred to the European Court of Justice for a preliminary ruling depends on whether Section 17 (3) sentence 1 of the German Unfair Dismissals Act (*KSchG*), which is to be interpreted in the same way as the second subparagraph of Article 2 (3) of the Mass Dismissal Act in conformity with European Union law, is to be regarded as a prohibition law pursuant to Section 134 of the German Civil Code (*BGB*) in the same way as other provisions in mass dismissal proceedings which - at least also - have the purpose of protecting employees. In this case, the termination would be invalid.
European Court of Justice		
Are vacation periods to be taken into account for overtime pay? **Preliminary ruling of the Federal Labour Court**	13.01.2022 - C-514/20 -	**Article 7 (1) of Directive 2003/88/EC (Working Time Directive) must be interpreted in the light of Article 31 (2) of the EU Charter of Fundamental Rights (*CFR*) as precluding a provision in a collective agreement under which, for the purpose of calculating whether the threshold of working time entitling to an overtime premium has been reached, the hours corresponding to the paid annual leave taken by the employee are not taken into account as hours worked.** Facts The European Court of Justice has to rule on the question of whether a provision in a collective agreement, which only takes into account hours actually worked for the calculation of overtime bonuses, is contrary to Union law. The Federal Labour Court has referred this question to the European Court of Justice for a preliminary ruling. The parties to the main proceedings before the Federal Labour Court dispute whether vacation periods are to be taken into account for overtime bonuses.

		The collective bargaining agreement applicable to the employment relationship stipulates that overtime bonuses of 25% are paid for periods exceeding a certain number of hours worked in the respective calendar month. Since the employer did not take into account the hours accounted for vacation in the calculation in the month of August 2017 and therefore did not pay the plaintiff any overtime surcharges, the plaintiff claims overtime surcharges for this month. He believes that vacation time should be included in the calculation of overtime pay. The courts previously dealing with the matter were of the opinion that vacation periods were not to be included in the calculation of overtime bonuses. The wording of the collective agreement clearly refers exclusively to the hours actually worked. The Federal Labour Court, on the other hand, assumes that not taking vacation periods into account when calculating overtime bonuses could constitute an incentive to forego vacation that is impermissible under European Union law. For this reason, the Federal Labour Court has referred this question to the European Court of Justice for a preliminary ruling. <u>The decision of the European Court of Justice</u> The European Court of Justice has ruled that the provision in a collective agreement according to which only the actual working time worked is taken into account when calculating overtime bonuses violates Art. 7 (1) of the Working Time Directive 2003/88/EC. In its reasoning, the European Court of Justice states that Art. 7 (1) of the Working Time Directive 2003/88/EC must be interpreted in light of Art. 31 (2) of the CFR, since the fundamental right to paid annual leave is concretized by Art. 7 (1) of the Working Time Directive 2003/88/EC. The fact that periods of rest leave are not taken into account when calculating overtime pay could create an incentive for employees to waive their right to annual leave. If the pay for annual leave taken is less than the normal pay, employees may be encouraged not to take annual leave. This is incompatible with the objectives pursued by the right to paid annual leave, according to the European Court of Justice.

Upcoming decisions

With the following overview of upcoming decisions in the following month, you will be informed in advance about which legal issues will be decided shortly and what consequences this may have for legal practice!

Subject	Date/AZ	Remark/ note for the practice
Federal Labour Court		
Avoidance of a termination agreement due to unlawful threat **Requirement of fair negotiation**	24.02.2022 - 6 AZR 333/21 -	In dispute is whether the termination agreement concluded between the parties was effectively contested due to unlawful threat and whether the termination declared after the contestation is effective. In a conversation with the managing director of the defendant, which was also attended by the defendant's attorney, the plaintiff employee was confronted with the accusation that she had unauthorizedly changed purchase prices for goods in the defendant's EDP system. She had not been informed beforehand that the conversation was to be about this accusation. She was then presented with a prepared termination agreement, according to which the employment relationship was to end at the end of the month for operational reasons and she was to receive her full remuneration until then. The termination agreement ended with a settlement receipt. After a break of about ten minutes, the plaintiff signed the agreement. Immediately thereafter, the plaintiff's husband, who was employed by the defendant and against whom similar allegations were made, also signed a termination agreement. Subsequently, the plaintiff declared that she contested the termination agreement. She had only concluded it because the defendant had unlawfully threatened her with immediate termination and criminal charges.

		The defendant thereupon terminated the employment relationship for cause or, in the alternative, for good cause. In her action, the plaintiff asserted the invalidity of both the termination agreement and the notices of termination. The Labour Court upheld the action. The Hamm Regional Labour Court considered the termination agreement to be effective and accordingly did not rule on the effectiveness of the termination without notice. It assumed that the requirement of fair negotiation had not been violated. The threat on the part of the defendant had not been unlawful in view of the concrete circumstances. The other negotiating conditions were not such as to arouse the plaintiff's instincts to flee. Unobjective, aggressive or insulting statements had not been made. Nor was the plaintiff's state of health impaired. The plaintiff contests this in her appeal.
Compensation under the General Equal Treatment Act (*AGG*) due to age discrimination in connection with an assistance position within the meaning of Sec. 78 (1) SGB IX	24.02.2022 - 8 AZR 208/21 -	The Federal Labour Court has to decide whether the defendant owes the plaintiff compensation pursuant to Sec. 15 (2) AGG due to a violation of the prohibition of discrimination on the grounds of age. The defendant operates an assistance service that supports disabled people in all matters relating to personal assistance. They can advertise a job offer with the defendant, among other things. For this purpose, the defendant provides them in advance with a questionnaire in which they can specify wishes with regard to the person of the assistant, such as their gender or age. If a placement is successful, the disabled person concludes a service contract with the defendant, and the assistant concludes an employment contract with the defendant. The plaintiff, who was born in 1968 and had previously worked as a so-called personal assistant, applied by e-mail to a job advertisement on the defendant's Internet portal. In this job offer, a 28-year-old severely disabled student was looking for a Personal Assistant in all areas of everyday life, who should preferably be between 18 and 30 years old. The defendant informed the plaintiff that it had decided to hire another applicant due to the high number of applications. Subsequently, the plaintiff asserted claims for compensation against the defendant under the AGG. After the defendant rejected the claims, the plaintiff pursued them in the legal action. She took the view that she

		had been unlawfully discriminated against because of her age. The job advertisement and the defendant's questionnaire already provided evidence of this. The Labour Court ordered the defendant to pay compensation in the amount of a potential gross monthly salary. The Cologne Regional Labour Court dismissed the action. It explained that the job advertisement indicated a direct discrimination of the plaintiff because of her age in the sense of Sec. 22 AGG. The different treatment was justified in the controversy however due to the vocational requirements of the activity of the personal assistance in accordance with Sec. 8 (1) AGG. The unequal treatment is beyond that after Sec. 10 AGG objectively justified. The plaintiff contests this with her appeal.
Federal Social Court		
Social Security Obligations of Minority Shareholder-Managers	01.02.2022 - B 12 KR 37/19 R - - B 12 R 19/19 R - - B 12 R 20/19 R -	In three similar proceedings before the Federal Social Court, it is disputed whether minority shareholder managing directors of a GmbH are subject to social security contributions. In all three proceedings, the defendant DRV Bund determined that the managing directors were subject to social security contributions. The actions brought against this determination were successful in some cases and unsuccessful in others before the respective lower courts dealing with the issue. Two of the state social courts shared the view of the DRV Bund and assumed a social insurance obligation. This was essentially justified by the fact that the managing directors concerned had no legal power to avert unwelcome shareholder resolutions according to the structure of the partnership agreements. There was no comprehensive blocking minority, so that employment subject to social security contributions had to be assumed. Even the fact that the managing directors concerned were granted a special right to manage the company on their own in these proceedings did not change this.

		The plaintiff managing directors have appealed against these decisions. Both managing directors are of the opinion that the special right to manage the company granted in each case has an even stronger effect than a blocking minority. The special right does indeed make it possible to oppose instructions by simply disregarding them. In the proceedings Ref.: B 12 R 19/19 R, the lower courts ruled in favour of the plaintiff managing director and thus rejected a social insurance obligation. The decision was mainly based on the fact that the plaintiff had a qualified blocking minority. She had been able to effectively defend herself against changes to the company on the basis of the 76% majority required under the articles of association and to effectively prevent instructions being issued to her as managing director. In particular, her dismissal was not possible without her consent. The defendant DRV Bund contests this in its appeal. It is of the opinion that the plaintiff managing director did not have an all-encompassing blocking minority. According to the managing director's contract, she was subject to a consent requirement in a very significant number of cases.

Legislative initiatives, important notifications & applications

This section provides a concise summary of major initiatives, press releases and publications for the month, so that you are always informed about new developments and planned projects.

Subject	Timeline	Remark/ note for the practice
Federal Minister of Labour plans permanent right to work from home	13.01.2022	Contrary to the wording in the coalition agreement, which only provides for a right to discussion, Labour Minister Hubertus Heil wants to create a legal right to work from home. He made this statement to the dpa news agency. According to Heil, employees should be able to work from home in the future if they do not have to be on site at the company. A refusal on the part of the employer should only be considered if there are compelling reasons.
Change in requirements for vaccination and convalescence certificates.	15.01.2022	With the ordinance amending the Corona Protection Measures Exemption Ordinance, which came into force on January 15, 2022, the requirements for proof of vaccination and convalescence were also newly regulated. The Robert Koch Institute (RKI) was commissioned and authorized to publish the applicable requirements for proof of recovery on its website. Similarly, the Paul Ehrlich Institute (PEI) was instructed to adapt the requirements for vaccination certificates as necessary and to publish them on its website. The following changes to the requirements for proof of vaccination and convalescence therefore apply: - Validity period of proof of recovery has been shortened from 6 months to 90 days. - For the "Johnson&Johnson" vaccine, two vaccinations are required to maintain "fully vaccinated" status

		Due to these changes, employers may also have to re-record the validity of employees' vaccination and convalescence certificates and update their documentation in connection with the checks required by Sec. 28b IfSG before entering the workplace if the requirements for "3G certificates" change.

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