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Employment Tracker

NOVEMBER 2022

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 practice
Federal Labour Court		
Compensation for vacation **Effectiveness of a preclusive period agreed in an individual contract**	05.07.2022 - 9 AZR 341/21 -	**An exclusion period provision in the form of general terms and conditions which covers all mutual claims arising from the employment relationship without excluding claims for intentional breach of contract and intentional tort from its scope of application violates Sec. 202 (1) of the German Civil Code and is therefore void pursuant to Sec. 134 of the German Civil Code. A reduction that preserves the validity of the contract is out of question.** *This was decided by the 9th Senate of the Federal Labour Court.* Facts In dispute was whether a possible claim of the plaintiff to compensation for vacation has lapsed due to non-observance of the preclusive period agreed in the employment contract. The plaintiff employee terminated her employment relationship with the defendant while she was on parental leave and at the same time applied for her remaining leave. After termination of the employment relationship, the plaintiff claimed leave entitlements for maternity leave periods in 2013 and 2014. The defendant is of the opinion that this leave was forfeited due to a preclusive period agreed in individual contracts.

The employment contract concluded between the parties contains a clause according to which mutual claims arising from the employment relationship and those connected with the employment relationship expire if they are not asserted within 3 months of becoming due.

In her action, the plaintiff is seeking payment in lieu of leave in accordance with Sec. 17 (4) BEEG in conjunction with Sec. 17 (1) BEEG. She is of the opinion that the defendant has not issued a reduction declaration to her. The defendant cannot rely on the preclusion period contained in the employment contract, since the employer is obligated to inform the employee specifically and in complete transparency about the amount of the vacation leave. The employer must also request the employee to take this leave.

In contrast, the defendant is of the opinion that it declared the reduction and invoked the time limit for termination. The employee could not rely on the case law of the Federal Labour Court on the employer's duty to inform about the existing leave and the taking of leave, since there was no longer any interest in recuperation for health protection at the end of the employment relationship.

The decision of the Federal Labour Court

The Federal Labor Court has ruled that the plaintiff is entitled to the asserted claim for vacation pay. In particular, the claim had not lapsed as a result of the exclusion period provision in the employment contract. The clause was void pursuant to Sec. 134 of the German Civil Code (Bürgerliches Gesetzbuch - BGB) because it violated the statutory prohibition on facilitating liability for intent in advance through a legal transaction (Sec. 202 (1) BGB).

The clause is so broad that it also covers claims for intentional breach of contract and intentional tort. This leads to the invalidity of the clause because it limits liability due to intent, contrary to Sec. 202 (1) BGB. Sec. 202 (1) BGB covers not only agreements on the statute of limitations, but also on preclusion periods. The provision on preclusion periods was not divisible and could therefore not be upheld for the claim to vacation compensation. This also applies with due regard to the special features applicable in labor law.

Continuation of the term of office of the representative body for severely disabled persons if the number of severely disabled employees in a company falls below the threshold value

19.10.2022

- 7 ABR 27/21 -

The representative body for severely disabled persons is the body representing the interests of severely disabled employees and employees with equal rights. In accordance with Sec. 177 (1) sentence 1 of the 9th German Social Code (SGB IX), it is elected for a regular term of office of four years in companies with at least five - not just temporarily employed - severely disabled persons. If the number of severely disabled employees in the company falls below the threshold of five, the office of the representative for severely disabled persons is not terminated prematurely.

This was decided by the 7th Senate of the Federal Labor Court.

Facts

It was in dispute whether the term of office of the representative body for severely disabled employees ends when the number of severely disabled employees falls below the threshold of five.

The applicant was elected as a representative for severely disabled employees in one of the employer's two plants in 2019. After the number of severely disabled employees fell below the threshold of five (Sec. 177 (1) sentence 1 SGB IX) on August 1, 2020, the employer informed the applicant severely disabled representative body that the severely disabled employees of this establishment would in future be looked after by the severely disabled representative body of the other establishment.

In the present proceedings, the representative body for severely disabled employees asserts its continued existence beyond August 1, 2020. She is of the opinion that the reduction in the number of severely disabled employees below the threshold value does not affect the existence of the representative body for severely disabled employees. For reasons of legal certainty, it is only important that the threshold value is reached at the time of the election.

In contrast, the employer pointed out that for works constitution law it is recognized that the term of office of the works council ends when the number of employees employed in the company falls below the threshold value of five, which is decisive for the election of a works council. It was of the opinion that the same must also apply to the representation of severely

The decision of the Federal Labor Court

The Federal Labor Court has ruled that the office of the representative body for severely disabled persons does not end prematurely if the number of severely disabled persons falls below the threshold of 5.

The law does not contain an express provision that the severely disabled persons' representative body is terminated if the number of severely disabled employees falls below the threshold value pursuant to Sec. 177 (1) sentence 1 of the 9th German Social Code (SGB IX). A premature termination of the term of office is also not required for reasons of legal system or with regard to the sense and purpose of the threshold value.

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 practice
Federal Labour Court		
Competent authority for mass dismissal notification after closure of a plant **Termination for operational reasons after opening of insolvency proceedings**	08.11.2022 - 6 AZR 15/22 -	The Federal Labor Court decides on the termination of the plaintiff's employment for operational reasons in connection with the Air-Berlin insolvency. In particular, it is disputed which employment agency must be notified of the mass dismissal if the original business no longer exists due to a shutdown. The plaintiff employee, who was employed by the debtor as a flight attendant in Düsseldorf, was dismissed for operational reasons by the defendant insolvency administrator after the opening of the insolvency proceedings. The plaintiff successfully defended herself against this dismissal before the Federal Labor Court. The Federal Labor Court ruled that the plaintiff's employment relationship - and that of the other employees whose employment relationships were terminated in this context - had not been effectively terminated. The insolvency administrator then initiated a new consultation procedure with the works council for ground staff and the staff representatives for flying personnel. The defendant insolvency administrator stated that he saw no possibility of reopening the business and that he therefore planned to repeat the terminations. The defendant consulted the works council and staff representatives about the planned layoffs and filed a mass layoff notice with the Employment Agency in Düsseldorf for the employees assigned to the Düsseldorf station. The defendant then terminated the plaintiff's employment relationship again.

		The plaintiff filed an action against these terminations. She took the view that the terminations were invalid. The mass dismissal notice had to be filed in Berlin at the debtor's headquarters and not in Düsseldorf, since there was no longer any operation there at the time of the notice due to the shutdown. The mass dismissal notice also had errors in its content. The consultation procedure was also defective. The lower courts dismissed the action. The plaintiff has appealed against this decision to the Federal Labor Court.
Cancellation of a transfer **Effects of a transfer which may be in violation of co-determination on the assignment of an employee to a part of the business which is being transferred**	15.11.2022 - 1 ABR 15/21 -	It is in dispute whether the defectiveness of a transfer of an employee under works constitution law has an effect on his assignment within the meaning of Sec. 613a of the German Civil Code (Bürgerliches Gesetzbuch - BGB) and the works council is therefore entitled to a claim for cancellation of the transfer under Sec. 101 sentence 1 of the Works Council Constitution Act (BetrVG). The employer carried out an organizational change in one of its plants and established a new division. The assets and tasks associated with this were transferred to the new division from the previous organizational units. The employer assigned the employees entrusted with the tasks - including the employee whose transfer is at issue in these proceedings - to the new unit. The works council, which had been informed of this, considered the measure to be a transfer and asserted a right of co-determination against the employer pursuant to Sec. 99 BetrVG, which the employer rejected. With its application, the works council asserted the cancellation of the transfer pursuant to Sec. 101 Sentence 1 BetrVG. During the ongoing proceedings, the new division was transferred to another company by way of a transfer of operations. On the basis of this, the employer is of the opinion that the proceedings have been settled due to the transfer of the business. With the transfer of the division, the employment relationship concerned here was also transferred to the acquiring company. The works council, on the other hand, claims that it is precisely the allocation of the employment relationship to the new division that is in dispute. If the assignment was a

		transfer subject to co-determination, it was also invalid under individual law due to the lack of the works council's involvement, and the employment relationship of the affected employee was not transferred with the business unit. The Munich Labor Court granted the application, but the Munich Regional Labor Court dismissed it. The Regional Labor Court based its decision mainly on the fact that decisions in termination proceedings pursuant to Sec. 101 Sentence 1 BetrVG only have effect for the future. The cancellation of a transfer by the employer can therefore only take place if the employer still has access to the employment relationship. If the employment relationship has been terminated - for example by notice of termination - or transferred to a third party as a result of a transfer of business, the former employer can no longer correct a possibly unlawful transfer. With the transfer of the employment relationship in the context of the transfer of the business, the employment relationship with the employer no longer existed. Consequently, the employer no longer had any access to this employment relationship. Consequently, there was no claim for cancellation of the transfer. In particular, the possible defectiveness of a transfer under works constitution law was irrelevant for the assignment. The Federal Labor Court must now decide whether the opinion of the Munich Higher Labor Court is correct.
Consideration of vacation periods for overtime bonuses **Collective agreement for temporary employment**	16.11.2022 - 10 AZR 210/19 -	The parties are in dispute as to whether hours billed for vacation must also be included in the calculation of overtime bonuses. The collective agreement applicable to the employment relationship stipulates that overtime bonuses in the amount of 25% are paid for periods exceeding a certain number of hours worked in the respective calendar month. Since the employer did not consider 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 are not to be included in the calculation of overtime bonuses. In this respect, the wording of the collective bargaining agreement clearly refers exclusively to the hours actually worked. The Federal Labor Court, on the other hand, assumed that not considering vacation periods

		when calculating overtime bonuses could constitute an incentive to forego vacation that is inadmissible under European Union law. For this reason, the Federal Labor Court referred this question to the European Court of Justice for a preliminary ruling. In its judgment of January 13, 2022 (C-514/20), the European Court of Justice ruled that Article 7 (1) of the Working Time Directive precludes the non-consideration of vacation time for the calculation of overtime bonuses. Considering the ruling of the European Court of Justice, the Federal Labor Court will now decide on the plaintiff's appeal.
Effectiveness of a transfer to another place of work abroad	30.11.2022 - 5 AZR 336/21 -	The Federal Labor Court decides whether the transfer of the plaintiff pilot to a foreign country and a precautionary dismissal with notice of change are effective. The plaintiff is employed by the defendant - an airline based in Malta - as a flight captain and is stationed at an airport in Germany. The defendant intended to close the station where the plaintiff was stationed and, as a result, transferred the plaintiff to an airport in Italy. As a precaution, it terminated the employment relationship and at the same time offered the plaintiff to continue the employment relationship with the new place of work in Italy. The plaintiff conditionally accepted the offer. In the parties' employment contract, it was agreed that the plaintiff could also be deployed at any other location of the company and that his remuneration would then be based on the system applicable there. The parties also agreed that Irish law would apply to the employment relationship. According to the collective pay agreement applicable to the employment relationship, German law applies to the employment relationships of pilots employed at German bases. The plaintiff therefore received significantly higher compensation than was agreed in his employment contract. A social collective agreement in force at the defendant provided that, in the event of a permanent closure of a base, the pilots employed there could be assigned to another base within Germany or in other EU countries by means of a transfer or change notice. The pilots who were transferred to a foreign stationing location were to be employed in accordance

with the social collective agreement under the working conditions and salaries applicable there.

In his action, the plaintiff claims that the transfer and the precautionary notice of termination are invalid. He is of the opinion that his transfer abroad and the associated change in the compensation system with significantly lower compensation are not covered by the defendant's right of direction. The precautionary change notice was also invalid. He did not have to accept the associated withdrawal of the collectively agreed application of German law. In addition, the defendant did not carry out a proper social selection.

The defendant is of the opinion that, due to the specifics of the industry and profession, a transfer clause under which a pilot can also be transferred abroad is permissible and the transfer is therefore not objectionable against the background of the closure of the station.

The lower courts found in favor of the defendant and therefore dismissed the action. In his appeal to the Federal Labor Court, the plaintiff is seeking to have the transfer and the precautionary notice of termination declared invalid.

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
Ordinance on the Opening of Short-Time Worker Benefits to Temporary Employees (Ordinance on the Opening of Short-Time Worker Benefits)	29.09.2022	The Ordinance on the Opening of Short-Time Worker Benefits was promulgated on September 29, 2022. This ordinance enables the payment of short-time allowance to temporary workers for a limited period from October 1, 2022 to December 31, 2022.

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