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Employment Tracker

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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.

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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		
Involvement of the works council in the classification of the released works council chairman	26.11.2024 - 1 ABR 12/23 -	**The increase in the salary of a works council member released from his professional duties in accordance with Section 37 (4) or Section 78 sentence 2 BetrVG is not subject to the co-evaluation of the works council in accordance with Section 99 BetrVG.** *This was decided by the 1st Senate of the Federal Labour Court.* *- Communicated by press release of 26.11.2024 –* Facts It was disputed whether the employer is obliged to initiate an approval procedure pursuant to Sec. 99 (1) of the German Works Constitution Act (BetrVG), for the classification of the released works council chairman. The employer in question has a works council whose chairman is completely released from his professional duties. Following a dispute about the correct classification of the works council chairman, the employer declared that the works council chairman would be given the opportunity to participate in the management potential assessment centre in order to determine the prerequisites for taking on the position of workshop manager. After successfully completing the assessment centre, the employer paid the works council chairman retroactively from 1 June 2020 according to remuneration group VIII (previously: remuneration group VI) of the relevant collective remuneration agreement, in which the position of workshop manager is named as

a standard example. The employer rejected the works council chairman's request for remuneration in accordance with remuneration group VIII from November 2019 - the date on which he was originally scheduled to take part in the assessment centre.

The works council requests that the employer involve it in the question of the remuneration of the works council chairman, as this is a classification or reclassification within the meaning of Section 99 BetrVG.

The employer, on the other hand, argues that the principles of classification do not apply to the remuneration of works council members who are released from their duties, as a member of the works council who is completely released from their duties does not receive remuneration for work performed, but rather remuneration in accordance with the principle of loss of earnings. The works council's right to participate in the remuneration of its members constitutes a conflict of interest and must therefore be excluded. Rather, the determination of the remuneration of fully released works council members is the sole responsibility of the employer, which is evident from the fact that the employer would face considerable criminal law risks if it paid excessive remuneration to a works council member - possibly as a result of the involvement of the works council. In addition, the question triggering the dispute as to whether the works council chairman can claim remuneration in accordance with remuneration group VIII from November 2019 pursuant to Sections 37 and 78 BetrVG must be clarified in the judgement proceedings with the applicable principles of the burden of presentation and proof and the bearing of costs.

The decision of the Federal Labour Court

The employer's appeal was successful before the 1st Senate of the Federal Labour Court.

The works council was not entitled to a right of co-evaluation pursuant to Section 99 BetrVG when increasing the salary of an released works council member on the basis of Section 37 (4) or Section 78 sentence 2 BetrVG.

The standard provides for the involvement of the works council in the case of classifications and reclassifications. These consist of the assignment of the activity to be performed by an employee to a specific group of the relevant remuneration scale.

In contrast, when the remuneration of an released works council member is increased pursuant to section 37 para. 4 or section 78 sentence 2 BetrVG, no such categorisation takes

		place, but rather an adjustment of the remuneration of the works council member in accordance with the statutory provisions set out in these standards. Accordingly, the remuneration of a released works council member must be adjusted either in line with the customary development of comparable employees or to avoid discrimination because the works council member could not be promoted to a higher-paid position solely as a result of taking office.
Compensation pursuant to Section 15 (2) AGG for non-payment of overtime bonuses	05.12.2024 - 8 AZR 370/20 -	**A provision in a collective agreement that requires the regular working hours of a full-time employee to be exceeded irrespective of the individual working hours for overtime bonuses treats part-time employees less favourably than comparable full-time employees due to their part-time work. It violates the prohibition of discrimination against part-time employees (Section 4 (1) of the German Part-time Employment Act (TzBfG)) if the unequal treatment is not justified by objective reasons. In the absence of such objective reasons, there is usually also indirect discrimination on the grounds of (female) gender in violation of the provisions of the General Equal Treatment Act (Section 7 (1) of the German General Equal Treatment Act (AGG)) if there are significantly more women than men in the affected group of part-time employees.** *This was decided by the 8th Senate of the Federal Labour Court.* *– Communicated by press release of 05.12.2024 –* Facts The dispute centred on whether the plaintiff, as a part-time employee, should be credited with additional hours as overtime bonuses and whether she is entitled to compensation pursuant to Section 15 (2) AGG for non-payment of overtime bonuses. The defendant employer is a nationwide dialysis provider. The plaintiff is employed as a part-time nurse with a working time of 40% of the regular working time of a full-time employee. According to the relevant general collective agreement, overtime must be paid in addition if it exceeds the monthly working hours of a full-time employee and cannot be compensated by time off in the respective calendar month in which the work is performed.

In March 2018, the plaintiff's working time credit totalled 129 hours and 24 minutes. This is overtime worked by her. The defendant did not pay the plaintiff overtime pay for these hours, nor did it credit any time to the plaintiff's working time account.

In her lawsuit, the plaintiff demanded that a further 38 hours and 39 minutes be credited to her working time account as overtime pay. In addition, she sought compensation in accordance with Section 15 (2) AGG in the amount of a quarter's earnings due to the failure to pay overtime bonuses on the grounds that the defendant had discriminated against her as a part-time employee on the grounds of gender.

The defendant believes that it is not legally objectionable to only grant overtime bonuses in accordance with the provisions of the collective agreement if work is performed in excess of the calendar-monthly working hours of a full-time employee. The obligation to pay extra pay for overtime is intended to ensure that the workload limit of 38.5 hours per week is not exceeded. Measured against this, both groups of employees were treated equally.

The decision of the Federal Labour Court

The plaintiff's appeal before the 8th Senate of the Federal Labour Court was partially successful. The Senate awarded the plaintiff the requested time credit - in agreement with the Regional Labour Court - and also awarded her compensation in the amount of 250.00 euros.

On the basis of the requirements of the European Court of Justice, the Senate had to assume that the relevant overtime bonus regulation from the general collective agreement is ineffective due to a breach of the prohibition of discrimination against part-time employees in that it does not provide for a proportionate reduction in the limit for the granting of an overtime bonus corresponding to the part-time quota in the case of part-time employment. There is no recognisable objective reason for the unequal treatment. The ineffectiveness of the overtime bonus provision in the collective agreement resulting from the breach of Section 4 (1) TzBfG leads to a claim by the plaintiff for the additional time credit claimed.

In addition, the plaintiff should be awarded compensation in accordance with § 15 para. 2 AGG. Through the application of the collective agreement provision, the plaintiff also suffered indirect discrimination on the grounds of gender, as more than 90% of the group of part-time employees at the defendant to whom the general collective agreement is personally applicable are women. The amount of EUR 250.00 was necessary, but also sufficient

		to compensate the plaintiff for the non-material damage caused by the indirect gender discrimination and to have the necessary deterrent effect on the defendant.
European Court of Justice		
Organisation of working hours: Employers of domestic workers must set up a system to measure daily working hours	19.12.2024 - C-531/23 -	**The judicial interpretation of a national provision or an administrative practice exempting employers from the obligation to introduce a system for measuring the daily working time of each worker as regards domestic workers is contrary to the Working Time Directive (2003/88/EC).** *This was recently decided by the European Court of Justice.* *- Communicated by press release dated 19 December 2024 -* Facts: A full-time domestic worker contested her dismissal before the Spanish courts. As her dismissal was declared unjustified, her employers were ordered to pay her certain amounts for holidays not taken and special payments. The Spanish court was of the opinion that the employee had not provided evidence of the wages she had paid or claimed. She could not rely on the fact that her employers had not provided daily records of the hours she had worked, as Spanish legislation exempts certain employers, including households, from the obligation to keep records of the hours actually worked by their employees. The Spanish court asked the Court of Justice about the compatibility of the national legislation with EU law. The decision of the European Court of Justice: The Court of Justice points out that in the CCOO judgment of 14 May 2019 - C-55/18 - it declared incompatible with the Working Time Directive (2003/88/EC) the Spanish legislation in force at the time and its interpretation by the national courts, according to which employers were not obliged to set up a system to measure the daily working time worked by each employee

	Insofar as employers are exempt from the obligation to introduce such a system as far as domestic workers are concerned, there is therefore a clear violation of the Directive. Domestic workers are thereby deprived of the possibility of objectively and reliably establishing how many hours they have worked and when these hours were worked. On the other hand, special provisions can be made on the basis of the sector of activity concerned or the characteristics of certain employers, such as their size, provided that the maximum weekly working time is actually guaranteed. Due to the particularities of the domestic work sector, exceptions can therefore be made for overtime and part-time work, provided that these do not deprive the regulation in question of its essential content. Since domestic workers are a group of employees with a clear majority of women, it cannot be ruled out that the present case constitutes indirect discrimination on grounds of sex, unless this situation is objectively justified.

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		
Continued payment of remuneration in the event of illness abroad	15.01.2025 - 5 AZR 284/24 -	The parties are in dispute as to whether the plaintiff is entitled to continued remuneration in the event of illness for the month of September 2022. The defendant is a distributor of components for the electrical industry. The plaintiff has been employed by the defendant as a warehouse employee since 2002. In 2017, 2019 and 2020, the plaintiff was on sick leave in direct temporal connection with his holidays. The plaintiff, who was on leave until 9 September 2022, informed the defendant on 7 September 2022 - at that time he was in Tunisia - that he was on sick leave until the end of September 2022 and submitted a medical certificate in French. After the defendant informed the plaintiff that the certificate was not a certificate of incapacity for work, the plaintiff submitted another certificate dated 17 October 2022 with a certified translation, in which the attending doctor confirmed that he had examined the plaintiff on and diagnosed bilateral lumboischialgia, which required a rest break with incapacity for work until the end of September 2022. The defendant did not accept this certificate either. With his lawsuit, the plaintiff is seeking continued payment of remuneration from the defendant for the month of September 2022. He believes that the medical certificate dated 7 September 2022 already clearly shows his incapacity to work. The defendant denies that the plaintiff was unable to work during the period in dispute. He believes that the certificates submitted do not show that it was an illness associated with an incapacity to work. There were also facts that were capable of undermining the alleged

		probative value of the certificates - for example with regard to the duration of the medical prognosis and the plaintiff's sick leave behaviour in previous years. The labour court dismissed the claim. The Munich Regional Labour Court - 9 Sa 538/23 - partially amended the judgement and ordered the defendant to continue to pay remuneration. With its appeal, the defendant continues to pursue its goal of a complete dismissal of the lawsuit.
Due date of a severance payment claim in the event of a judicial review of the effectiveness of the social compensation plan	28.01.2025 - 1 AZR 73/24 -	It is disputed whether the defendant was in default with the severance payment due to the stipulations in the social plan and whether the plaintiff can therefore claim default interest. The plaintiff was employed by the defendant as a call centre employee until 31 July 2019. The defendant, which has a works council, is part of a group that concluded a reconciliation of interests with the group works council with the content of the closure of the call centre on 31 July 2019. Due to the closure, the defendant terminated the plaintiff's employment relationship, against which the latter did not defend herself with an action for unfair dismissal. On 8 May 2019, a conciliation committee established between the defendant and its works council decided on a social compensation plan, which provides for the payment of severance payments for the employees affected by the plant closure. No. 5 of the social compensation plan stipulates that claims to severance payments arise upon its conclusion and become due upon the legal termination of the employment relationship. An application initiated by the defendant to establish the invalidity of the social plan was unsuccessful in all instances, with the result that the defendant paid the plaintiff a severance payment from the social plan in May 2021. With her lawsuit, the plaintiff is demanding default interest for the period from 1 August 2019 to May 2021 on the aforementioned severance payment. She argues that the defendant was in default with the payment of the severance payment after the notice period expired on 31 July 2019. The contestation of the social plan has no significance for the start of the default. The defendant is of the opinion that the due date agreed in the social compensation plan is of no significance, as the effectiveness of the social compensation plan has been reviewed by the courts. The plaintiff’s claim to severance pay was only established with the final decision of the Federal Labour Court on the non-admission of the appeal. In any case, she

		was not at fault, as there was uncertainty about the basis of the payment claim itself, which was only eliminated with the conclusion of the decision proceedings. The lower courts (including the Saxon Regional Labour Court - 5 Sa 76/22) dismissed the lawsuit. The plaintiff contests this with her appeal.
Digital access right of a trade union to the company - possibility of using the existing internal digital communication channels	28.01.2025 - 1 AZR 33/24 -	The parties are in dispute as to whether the plaintiff has a right of access to the defendant's digital communication channels. The plaintiff is the trade union IGBCE. The defendant manufactures sporting goods. A large part of the defendant's internal communication takes place electronically. For this purpose, numerous employees are equipped with end devices and e-mail addresses that can only be generated by the defendant. The employees concerned also have access to the defendant's intranet. In addition, the defendant uses the 'Yammer' programme, which employees can use to contact each other. Each employee has access to, among other things, the surname, first name and work e-mail address of the other employees. The plaintiff trade union unsuccessfully demanded access to the defendant's digital communication channels. In the lawsuit, the plaintiff is seeking the disclosure of all current and future work emails of the employees working at the company, access to and use of 'Yammer' and a link to its website from the defendant's intranet site. The plaintiff is of the opinion that corresponding rights arise from its freedom of association-specific activity guaranteed by Article 9(3) of the German Constitution (GG). The communication channels commonly used in the company and increasing digitalisation require a corresponding digital right of access for the trade union for the purpose of recruiting members and providing information. In contrast, the defendant argues that there is no legal basis for the plaintiff's claims. The communication takes place on site in its company, which is still based on a company organisation with the presence of employees. Furthermore, there were data protection concerns about the digital access rights asserted by the plaintiff. The lower courts (including the Nuremberg Regional Labour Court - 7 Sa 344/22) dismissed the lawsuit. With her appeal, the plaintiff continues to pursue her claim in its entirety.

Issue of payslips as electronic documents based on a group works agreement on the introduction and use of a digital employee mailbox	28.01.2025 - 9 AZR 48/24 -	There is a dispute as to whether payslips can be issued in accordance with Section 108 of the German Trade Regulation (GewO) by entering them in a newly introduced digital employee mailbox. The defendant operates a discount grocery store in which the plaintiff is employed as a sales assistant. In 2021, the defendant concluded a group works agreement with the group works council on the introduction and use of a digital employee mailbox. This agreement stipulated, among other things, that all personnel documents would in future - after a nine-month transition period exclusively - be provided by an external provider in a newly created digital employee mailbox, where employees would be able to view and, if necessary, print them out. After the plaintiff had last received a payslip for February 2022 in paper form, she unsuccessfully requested the defendant to refrain from making the payslips available exclusively via the digital employee mailbox in future. The plaintiff is pursuing this claim further and is demanding the issue of monthly payslips for the period from March 2022 to March 2023. She is of the opinion that the payslips were not issued by posting them in the digital employee mailbox, as she - the plaintiff - did not consent to access via the digital employee mailbox. The provisions made in the group works agreement could not replace her lack of consent. The defendant believes that the payslips were issued. The digital employee mailbox is a cloud service on which the payslips are stored, so that the file was within the plaintiff's sphere of control due to the plaintiff's ability to access it and was therefore received by her. The decisive factor was not whether the plaintiff agreed to access via the digital employee mailbox, but whether this was reasonable for her. In the opinion of the defendant, this was undoubtedly the case because the plaintiff herself had communicated digitally when she objected to the use of the employee mailbox. The group works agreement also constituted an effective legal basis for issuing the payslip exclusively via the digital employee mailbox. The Labour Court dismissed the lawsuit. On the plaintiff's appeal, the Lower Saxony Regional Labour Court - 9 Sa 575/23 - amended the judgement of the Labour Court and upheld the lawsuit in full. With its appeal, the defendant is pursuing the restoration of the labour court's decision.

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
Adaptation of the 'Technical Instructions on Temporary Employment Act'	15.10.2024	The Federal Employment Agency has amended its 'Technical Instructions on Temporary Employment Act' with effect from 15 October 2024. The Technical Instructions provide guidance on how the Federal Employment Agency would like the Temporary Employment Act to be understood. They thus prevent the agency - if the Technical Instructions are implemented verbatim - from initiating measures under licensing law, in particular against a personnel service provider. At a glance: ▪ The amendments are mainly of a clarifying or editorial nature. ▪ Proof of creditworthiness must now be provided by the personnel service provider in the amount of at least EUR 15,000. This applies to the intended employment of up to 5 temporary workers. ▪ If there are more than 5 temporary workers, at least EUR 3,000 in liquid assets must be proven for each of them.
Social Security Calculation Ordinance 2025	27.11.2024	The Federal Cabinet adopted the Social Insurance Calculation Values Ordinance 2025 on 6 November 2024. The Bundesrat approved it on 22 November 2024, meaning that the ordinance can enter into force on 1 January 2025. The ordinance adjusts the relevant social insurance calculation parameters in line with wage trends over the past year. At a glance: ▪ The underlying wage trend in 2023 was 6.44 per cent across Germany as a whole

		▪ The contribution assessment ceiling for general pension insurance will increase to €8,050 per month in 2025 (2024: €7,550) ▪ The income threshold for statutory health insurance will rise to €5,512.50 per month (2024: €5,175). ▪ The compulsory insurance limit for statutory health insurance (annual income limit) increases to €6,150 per month (2024: €5,775).
Draft law on flexible working hours	17.12.2024	The FDP parliamentary group's draft bill was recently published. This will be debated in the Bundestag for the first time on Friday, 20 December 2024. Regulations at a glance: ▪ The parliamentary group is calling for further flexibilisation of working hours. A modernisation of the provisions of the Working Hours Act is long overdue. ▪ In the German Working Hours Act, new deviation options are to be created by collective agreement or by a company or service agreement concluded on the basis of a collective agreement. This would create new scope for the organisation of working hours, as provided for in the EU Working Time Directive (2003/88/EC). In detail: ▪ Amendment of Section 7 ArbZG. ▪ Specification of a maximum weekly working time of 48 hours on average instead of a maximum daily working time. ▪ Reduction of rest periods without restrictions on the duration or type of work.
Draft of a 3rd amendment ordinance to extend the period of entitlement to short-time working allowance	18.12.2024	The amending ordinance passed by the Federal Cabinet extends the period of entitlement to short-time working allowance to up to 24 months. This was announced by the Federal Ministry of Labour and Social Affairs in a press release. This is the Federal Government's response to a significant increase in short-time working in Germany.

	The aim is to give companies more planning security in difficult times so that they can retain their experienced and trained employees. The ordinance and the extension of the benefit period will apply until 31 December 2025, after which the regular benefit period of a maximum of 12 months will apply again.

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