Employment Tracker

May 2022

GÖRG

YOUR BUSINESS LAW FIRM

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		
Establishment of an employment relationship in accordance with Sec. 9, 10 German Temporary Employment Act (AÜG)	26.04.2022 - 9 AZR 228/21 -	**If a temporary worker is transferred from abroad to Germany without permission within the meaning of Section 1 of the old version of the Temporary Employment Act, the violation of the obligation to obtain permission does not lead to the invalidity of the temporary employment contract pursuant to Section 9 No. 1 of the old version of the Temporary Employment Act if the temporary employment relationship is governed by the law of another member state of the European Union. The requirements for a change of employer pursuant to Section 10 (1) sentence 1 AÜG (old version) are not met in this case.** Facts The decisive issue before the Federal Labour Court was whether the plaintiff was provided to the defendant as a temporary employee and whether an employment relationship was established between the parties pursuant to Sections 9, 10 AÜG due to the lack of a permit to provide temporary employees.

		The plaintiff was employed based on an employment contract with a French company based in Paris. The employment contract was written in French and referred to a French collective bargaining agreement. The employer sent the plaintiff to work for the defendant based in Germany, for whom the plaintiff worked for approximately 1 ½ years. The basis for this was a contract concluded between the two companies for consulting services, for which the validity of French law was agreed. However, the employer did not have a German permit to hire out employees. When the plaintiff was no longer working for the defendant, but rather for other customers of the employer, the employer terminated the employment relationship. As a precaution, the defendant then also terminated any existing employment relationship with the plaintiff. The plaintiff is of the opinion that an employment relationship came into existence between her and the defendant pursuant to Sec. 10 (1) AÜG (old version) because she was provided to the defendant by her employer as an employee without the necessary permit. The decision of the Federal Labour Court The Federal Labour Court has ruled that no employment relationship has come into existence between the parties and that the claims asserted are therefore unfounded. In its reasoning, the Federal Labour Court essentially stated that the requirements for the establishment of an employment relationship by operation of law pursuant to Sec. 10 (1) Sentence 1 AÜG (old version) were not met. This applies even in the event that the plaintiff was provided to the defendant as a temporary employee. The establishment of an employment relationship between the temporary employee and the hirer by operation of law requires that the temporary employment contract concluded between the hirer and the temporary employee is invalid because of unauthorized employee leasing pursuant to Sec. 9 No. 1 AÜG old. If the temporary employment relationship is subject to the law of another member state of the European Union, neither Sec. 2 No. 4 of the old version of the German Employee Posting Act (AEntG) nor the German Temporary Employment Act (AÜG) stipulates that Sec. 9 No. 1 of the German Temporary Employment Act (AÜG) shall take precedence over this law.

		In particular, Sec. 2 No. 4 AEntG (old version) does not order the validity of provisions, which - like Sec. 9 No. 1 and Sec. 10 Subsection 1 Sentence 1 AÜG (old version) concern the existence of the temporary employment relationship. Sec. 9 No. 1 AÜG (old version) was also not an encroachment provision within the meaning of Article 9 (1) Rome I Regulation. The Temporary Employment Act does not grant temporary workers who are hired out by their employers from another Member State of the European Union to Germany any protection going beyond Sec. 2 AÜG (old version).
Federal Social Court		
Accident insurance coverage during an introductory internship?	31.03.2022 - B 2 U 13/20 R -	**A job applicant is protected by statutory accident insurance when visiting the company as part of a one-day unpaid "getting-to-know-you internship".** *The 2nd Senate of the Federal Social Court decided this on March 31, 2022.* Facts The plaintiff, who was looking for work, completed a one-day "getting-to-know-you internship" at a company free of charge based on a "getting-to-know-you/internship agreement" with this company. During the "get-to-know-you" internship, the participants had discussions, a tour of the company, a technical exchange with the IT department and, finally, a tour of a high-bay warehouse. During the tour of the high-bay warehouse, the plaintiff fell and broke her right upper arm. The defendant employers' liability insurance association refused to recognize the injury as an occupational accident.

		The decision of the Federal Social Court Unlike the defendant employers' liability insurance association and the lower courts, the Federal Social Court found that the plaintiff had suffered an occupational accident. At the time of the accident, the plaintiff was a participant in a company tour. According to the statutes of the defendant employers' liability insurance association, participants in a company tour - in contrast to the statutes of other accident insurance institutions - are insured against accidents. The plaintiff's own - uninsured - interest in getting to know the potential future employer did not prevent accident insurance coverage here by virtue of the statutes. The provision of the defendant's statutes is not limited to persons whose stay in the company is exclusively for visiting. According to the Federal Social Court, entrepreneurs should rather be comprehensively exempted from liability risks that may arise due to increased risks during company visits.

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		
Entitlement to company pension adjustment	03.05.2022 - 3 AZR 374/21 -	The plaintiff is seeking an increase in his company pension before the Federal Labour Court. He has been receiving company pension benefits since 2006. The defendant employer provides these through a regulated pension fund (Versorgungskasse Deutscher Unternehmen), which is supervised by the German Federal Financial Supervisory Authority (BaFin). The plaintiff's company pension has not been increased since 2009 because the members' meeting of the pension fund decided each year - with the approval of BaFin - to use the entire surplus for the loss reserve. For this reason, no funds were available for adjusting the company pension. In his action, the plaintiff is accordingly claiming an increase in his company pension. The defendant is of the opinion that it is exempt from the adjustment review obligation (Sec. 16 (1) BetrAVG) due to the special provision of Sec. 16 (3) No. 2 of the German Occupational Pensions Act (BetrAVG). According to this provision, the adjustment review obligation does not apply if a pension fund uses all surplus shares attributable to the pension portfolio to increase current benefits from the start of the pension.

		The plaintiff is of the opinion that the defendant cannot rely on this provision because it is not applicable to the cut-off date at issue in 2012. The transitional provision to the contrary in Sec. 30c (1a) BetrAVG is unconstitutional. In any case, the requirements of the exception were not met. The lower courts dismissed the action. The Regional Labour Court confirmed the view of the defendant. The requirements of Sec. 16 (3) No. 2 BetrAVG were met, so that the defendant was not obligated to review an adjustment. The transitional provision of Sec. 30c (1a) BetrAVG was not unconstitutional. The plaintiff appeals against this decision and continues to request an increase in his company pension.
Overtime compensation **Burden of proof and presentation in overtime litigation**	04.05.2022 - 5 AZR 359/21 -	The Federal Labour Court decides whether the plaintiff is entitled to overtime pay. In this context, the focus is in particular on the question of whether the principles of the Federal Labour Court on the burden of presentation and proof in overtime proceedings have changed as a result of the time recording ruling of the European Court of Justice in the CCOO case. The plaintiff worked for the defendant as a delivery driver. His working hours were recorded using a technical working time recording system. The plaintiff and other drivers were not able to register any breaks in the system. Accordingly, the plaintiff's working time account showed corresponding positive hours, which he is now demanding to be remunerated. According to the plaintiff, he had always worked continuously and had not taken any breaks. He had not been instructed to do so. Rather, the nature of the work was such that breaks were not possible. The defendant, on the other hand, is of the opinion that the plaintiff did not work overtime. He was instructed to take breaks and did take them. The technical record does not document his working time in a decisive manner. The burden of presentation and proof in the overtime proceedings lies with the plaintiff despite the judgment of the European Court of Justice of May 14, 2019 (- C 55/18 - [CCOO]). The Labour Court awarded the plaintiff the claimed overtime compensation. In contrast, the Regional Labour Court upheld the defendant. According to the established case law of the Federal Labour Court, the

		plaintiff was obliged to present and prove that he had ordered, approved or tolerated overtime. Despite the decision of the European Court of Justice in the CCOO case, the Federal Labour Court has clearly not abandoned this case law. The European Court of Justice lacks the competence to deal with questions of remuneration for work. Therefore, its decision dealt solely with questions of occupational health and safety and the effective limitation of maximum working hours. Even if it were assumed that the plaintiff had worked the alleged overtime, he had not substantiated that it had been ordered, approved or tolerated by the defendant or that it had been necessary for operational reasons. In the appeal allowed by the Regional Labour Court, the plaintiff continues to pursue his original claim for payment.

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
Draft Law on the Implementation of the Working Conditions Directive in Civil Law	06.04.2022 *Government draft*	The Federal Ministry of Labour and Social Affairs has published a government draft for the implementation of the Working Conditions Directive (Directive 2019/1152). On April 08, 2022, the draft was forwarded to the German Federal Council (Bundesrat). The Working Conditions Directive aims to improve working conditions by promoting transparent and more predictable employment while ensuring the adaptability of the labour market. To achieve this goal, the directive provides for the following measures: ▪ Extending the employer's obligation to provide information on the essential aspects of employment relationships (so-called obligations to provide evidence), which is already provided for in the Evidence Directive. ▪ Establishment of minimum requirements for working conditions with regard to the maximum duration of a probationary period, multiple employment, minimum predictability of work, requests for a transition to another form of work, and compulsory further training ▪ provisions on the enforcement of the aforementioned provisions In essence, the draft law proposes to supplement Sec. 2 of the Verification Act with those facts about which the employer must provide information according to the directive. According to the draft law, these include: ▪ The duration of the agreed probationary period

		▪ The agreed rest breaks and rest periods and, in the case of agreed shift work, the shift system, shift rhythm and conditions for shift changes ▪ The possibility of ordering overtime and its preconditions ▪ Any entitlement to training provided by the employer ▪ The name and address of the pension provider, if the employer promises the employee a company pension through a pension provider • The procedure to be followed when terminating the employment relationship, at least the written form requirement and the deadlines for termination, as well as the deadline for bringing an action for protection against dismissal • A general reference to the applicable collective bargaining agreements, works agreements or service agreements. Other provisions of the bill: ▪ Extensive obligations to take minutes when employees are posted abroad ▪ Shorter deadlines: In the future, the employee is to be provided with a transcript of certain details on the first day of work. Changes to the main contractual conditions are also to be communicated in writing on the day on which the change takes effect. ▪ Introduction of an administrative offense ▪ Amendment of other laws to implement the Directive (TzBfG, AÜG, AentG, GewO, SeeArbG).
Draft Law for Better Protection of Whistleblowers and for the Implementation of the Directive on the Protection of Persons Reporting Infringements of Union Law	13.04.2022 *Draft Bill*	The Federal Ministry of Justice has published a draft bill for better protection of whistleblowers and for the implementation of the Directive on the Protection of Persons Reporting Breaches of Union Law. The draft provides for the following key regulatory elements: ▪ The personal scope of application (Sec. 1 HinSchG) includes all persons who have obtained information about infringements in their professional environment.

(Whistleblower Protection Act (*Hinweisgeberschutzgesetz*) - HinSchG)		▪ The material scope of application (Sec. 2 HinSchG) takes up the legal areas specified by the Directive. In order to avoid contradictions and to make the practical application manageable for whistleblowers as well as for internal and external reporting offices, in particular, criminal law and certain administrative offenses were included and the areas of law specified by the Directive were extended to a limited extent to corresponding national law. ▪ For whistleblowers, internal and external reporting channels are provided as two equivalent reporting channels, between which they can freely choose (Sec. 7 to 31 HinSchG). ▪ In implementation of the requirements of the Directive and in compliance with the case law of the ECtHR, the conditions are defined under which a whistleblower may make information about violations publicly available (Sec. 32 HinSchG). ▪ If whistleblowers comply with the requirements of the HinSchG for reporting or disclosure, they are extensively protected from reprisals such as dismissal or other disadvantages (Sec. 33 to 39 HinSchG).
Draft Law on the Implementation of the Provisions of the Transformation Directive on Employee Participation in Cross-Border Transformations, Mergers and Demergers	19.04.2022 *Draft Bill*	The Conversion Directive (Directive 2019/2121) came into force on January 1, 2020 and must be implemented in German law by January 31, 2023. The German Federal Ministry of Labour and Social Affairs (BMAS) has now published a draft bill on the implementation of the directive's provisions with regard to co-determination law. Key regulatory elements of the draft legislation: ▪ According to the BMAS draft bill, the co-determination regulations of the Directive on cross-border change of legal form and cross-border demerger will be implemented in a new law on the co-determination of employees in cross-border change of legal form and cross-border demerger (MgFSG). The MgFSG is primarily intended to apply to the organization of co-determination in companies with a German legal form resulting from a cross-border change of legal form or a cross-border demerger ("inward transformation").

		▪ Uniformly for cross-border transformation of legal form, cross-border demerger and merger, negotiations on co-determination in an emerging company are already required if a participating company employs a number of employees which corresponds to at least four fifths of the threshold value which triggers company co-determination in the Member State of departure ("four-fifths rule"). ▪ The scope for implementation with regard to the election of the employee representatives in the special negotiating body attributable to Germany will be filled according to the model of the current law. In order to avoid delays and unnecessary costs, the election shall be carried out by existing bodies representing the employees. The special features of cross-border demergers are taken into account by guaranteeing seats for the employees directly affected. ▪ In the case of a cross-border change of legal form and a cross-border division, there is strict protection of co-determination rights. Following the example of the formation of an SE by conversion, all components of co-determination are protected both in the case of co-determination by agreement and in the case of the statutory standard rules. ▪ The protection in the case of subsequent conversions is regulated in a uniform manner for cross-border changes of legal form, cross-border demergers and cross-border mergers. The separate regulations for subsequent domestic and subsequent cross-border transformations create legal certainty in the demarcation between the negotiated solution prescribed by EU law and domestic co-determination law.

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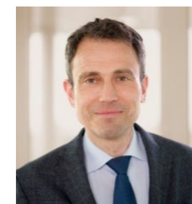

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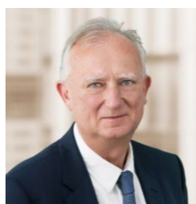

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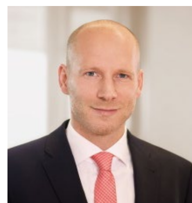

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