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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		
Legal consequences of errors in the collective redundancy notification procedure **Addendum to the request for a preliminary ruling**	23.05.2024 - 6 AZR 152/22 (A) -	**The 6th Senate of the Federal Labour Court requests the Court of Justice of the European Union to clarify the question of whether the purpose of the mass dismissal notification is fulfilled if the employment agency does not object to an incorrect mass dismissal notification and thus considers itself to be sufficiently informed.** Facts of the case In the original proceedings before the Federal Labour Court, the validity of a dismissal in the context of a mass dismissal is in dispute. The decisive question is whether this was properly reported to the Federal Employment Agency. By order of December 14, 2023 - 6 AZR 157/22 (B) - the 6th Senate of the Federal Labour Court asked the 2nd Senate of the Federal Labour Court pursuant to Section 45 (3) sentence 1 of the German Labour Court Act (ArbGG) whether the latter adheres to its legal opinion that a dismissal declared in the context of a mass dismissal is null and void if no notification or an incorrect notification pursuant to Section 17 (1) and (3) of the German Dismissal Protection Act (KSchG) was made at the time of its receipt. In its decision of February 1, 2024 - 2 AS 22/23 (A) - the 2nd Senate suspended the inquiry proceedings and asked the Court of Justice of the European Union to answer the necessary questions on the interpretation of the provisions underlying §§ 17 et seq. KSchG Council Directive 98/59/EC of July 20, 1998 on the approximation of the laws of the Member States relating to collective redundancies.

		The decision of the Federal Labour Court In addition to the above-mentioned referral, the 6th Senate asked the Court of Justice of the European Union to interpret EU law on, among other things, whether the purpose of the mass dismissal notification is fulfilled if the employment agency does not object to an incorrect mass dismissal notification and thus considers itself to be sufficiently informed.
Offsetting periods of ordered quarantine against approved annual leave	28.05.2024 - 9 AZR 76/22 -	Facts of the case It is disputed whether the plaintiff is entitled to have 8 days of leave credited to his leave account. In this context, it is particularly questionable whether the entitlement to paid annual leave is fulfilled if domestic quarantine is ordered by the competent authority for the leave period already determined by leave approval due to suspected infection with the coronavirus. After the defendant employer had approved the leave requested by the plaintiff, the city of Hagen ordered the plaintiff to quarantine at home because he had been in contact with a person infected with the coronavirus. For the duration of the quarantine, the plaintiff was prohibited from leaving his home and receiving visits from people outside his household without the express consent of the public health department. The defendant debited the plaintiff's vacation account with eight days and paid him the vacation pay. The plaintiff is now requesting that the vacation days be credited back to his vacation account because he was not able to take his vacation as he wished. The situation in the event of a quarantine order is comparable to that resulting from an incapacity to work due to illness. The employer must therefore grant him additional leave in accordance with Section 9 Federal Vacation Act (BUrlG), according to which medically certified periods of illness during leave may not be counted towards annual leave. The Labour Court dismissed the case, but the Regional Labour Court ruled in favour of the plaintiff. As part of the appeal proceedings, the Federal Labour Court had initially referred questions on the interpretation of the Working Time Directive to the Court of Justice of the European Union, but withdrew the referral due to a decision by the Court of Justice in a

similar case in the meantime. The Federal Labour Court has now ruled in consideration of the decision of the Court of Justice (C 206/22).

The decision of the Federal Labour Court

The Federal Labour Court ruled – following the ruling of the Court of Justice in case C-206/22 – that the employer does not owe any additional success of the vacation leave beyond the paid leave itself. Therefore, the leave entitlements are fulfilled despite the fact that the employee had to spend his leave in quarantine. The Federal Labour Court (also) did not follow the plaintiff's argument that an officially ordered quarantine is a condition similar to illness.

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		
Effectiveness of a fixed-term employment contract for the entire duration of the fixed-term if the employee is unable to work	12.06.2024 - 7 AZR 188/23 -	The parties are in dispute over the validity of a fixed-term employment contract. The defendant employed the plaintiff as a parcel deliverer for a fixed term. The fixed term of the employment contract had already been extended several times. The fixed-term employment contract in question provided for the fixed-term employment of the plaintiff from 01.05.2022 to 28.05.2022. The actual reason for the fixed term was the absence of several employees due to vacation, which the plaintiff was supposed to cover. Even before the end of the disputed period, the plaintiff was unable to work until after May 2022. The plaintiff provided evidence of his disability in the form of several disability certificates. The first certificate was dated until May 8, 2022. In his claim for termination of his employment, the plaintiff argued that it was clear from the outset that he would not be able to represent the aforementioned employees. He claimed that he had informed the branch manager not only by WhatsApp but also by telephone about the accident he had suffered at work on April 23, 2022. A 30 kg package had fallen from head height with the corner against his stomach. The defendant denies that it was clear when the employment contract was concluded that the plaintiff would be absent due to illness beyond the duration of the fixed-term employment contract. The labour court dismissed the claim. The Higher Labour Court (Lower Saxony, judgment of 11.05.2023 - 5 Sa 27/23) essentially upheld it. The Higher Labour Court stated that an employer cannot rely on the substantive reason of substitution if it knows for certain that

		the employee employed on a fixed-term contract will not be able to perform the contractually stipulated substitution task for a single day due to illness or other circumstances. The defendant's appeal is directed against this judgment.
Delayed acceptance compensation and vacation entitlements in connection with the facility-related vaccination obligation	19.06.2024 - 5 AZR 167/23 -	The Federal Labour Court decides on the occasion of the facility-related vaccination obligation under Section 20a of the Infection Protection Act (IfSG) whether the plaintiff is entitled to remuneration claims from the point of view of default of acceptance and vacation claims, although she has not been vaccinated against the coronavirus. The plaintiff worked as an everyday companion in a senior citizens' centre. After the defendant employer became aware that the plaintiff had not been vaccinated against the coronavirus, it reported this to the competent health authority in accordance with Section 20a (2) sentence 2 IfSG. The plaintiff was then initially employed unchanged. On March 29, 2022, the plaintiff was verbally informed that she would be irrevocably released from her obligation to work from April 2022 without payment of remuneration due to the lack of proof of immunity. On March 31, 2022, the defendant received a certificate of incapacity for work. The managing director then repeated - this time in writing - the previously issued exemption. In accordance with the leave of absence, the plaintiff was not employed from April 2022 and received no remuneration. In the meantime, the defendant deregistered the plaintiff from social security. In her complaint, the plaintiff asserts that Section 20a (3) sentence 4 IfSG only regulates an immediate ban on employment for newly hired employees. It is the responsibility of the defendant to issue instructions to protect the residents of the home from infection until the health authority issues a ban on employment. This could be done, for example, by wearing FFP2 masks or regular testing for infection with the coronavirus. The defendant wrongly argued that her employment was unreasonable after she had continued to employ her unchanged in the period from 16.03.2022 to 29.03.2022. At best, the defendant was entitled to release her from the obligation to perform her work with pay. She was therefore fully entitled to remuneration for the period of release as well as unreduced vacation entitlements.

		The lower courts (including LAG Düsseldorf, judgment of 19.04.2023 - 12 Sa 621/22) dismissed the claim. The Regional Labour Court stated that the defendant could not reasonably be expected to employ the plaintiff as an everyday helper in a senior citizens' centre and that the claim for remuneration was therefore void if the activity requirements pursuant to Section 20a (1) IfSG were not met and no considerations were apparent that would argue in favour of the employee in the context of the exercise of discretion pursuant to Section 20a (5) sentence 3 IfSG. The fact that the health authority only issued a ban on the plaintiff's activities from September 2022 does not change this, nor does the fact that she is an existing employee. The plaintiff is appealing against the decisions of the lower courts with her appeal to the Federal Labour Court.
Compensation and damages due to (disputed) violation of data protection regulations and personal rights	20.06.2024 - 8 AZR 253/20 -	The Federal Labour Court has to decide whether the defendant is obliged to pay the plaintiff compensation as well as material damages due to a violation of data protection regulations and his right to privacy assumed by the plaintiff. The defendant operates the medical service of a health insurance company. The plaintiff works for the defendant as an employee in the IT department as a system administrator. From November 2017, the plaintiff was uninterruptedly unable to work and received sick pay from his health insurance fund from May 2018 after the end of continued payment of remuneration. The latter commissioned the defendant as a medical service to provide an expert opinion to eliminate doubts regarding the plaintiff's inability to work. For this particular constellation - called a “special case” by the defendant - in which the defendant has a “dual function” in that it is both the employer of the person to be assessed and acts in its capacity as a medical service for the statutory health insurance funds and prepares expert opinions to eliminate doubts about the incapacity to work of insured persons, the defendant has a “special case organizational unit” and special regulations. This also includes the “Service directive for the protection of social data of employees of the Medical Service of the Health Insurance Fund and their relatives”. A doctor employed by the defendant, who belonged to the “Special Cases Organizational Unit”, prepared an expert opinion which contained the diagnosis of the plaintiff's illness. In order to prepare the expert opinion, the doctor had, among other things, telephoned the plaintiff's attending physician and obtained information from him.

With his claim, the plaintiff is seeking payment of compensation as the defendant has seriously violated his right to privacy. As his employer, the defendant was not allowed to carry out the tasks of the medical service and thus was not allowed to obtain his health data. The defendant had also taken inadequate precautions to protect this data.

The labour court dismissed the claim. Before the Regional Labour Court (Düsseldorf, judgment of 11.03.2020 - 12 Sa 186/19), the plaintiff additionally sought material damages in the amount of the lost earnings. Without the personal injury in question, he would have been able to resume his work at the defendant from December 2018. The Regional Labour Court dismissed the plaintiff's appeal.

With his appeal, the plaintiff continues to pursue the desired compensation and material damages. By order of August 26, 2021, the 8th Senate of the Federal Labour Court asked the Court of Justice of the European Union to answer questions on the interpretation of the General Data Protection Regulation in accordance with Art. 267 TFEU, which it did in its judgment of December 21, 2023 - C-667/21. The Federal Labor Court will now decide taking into account the ruling of the Court of Justice of the European Union.

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
Scholz calls for raising minimum wage to 15 euros	18.05.2024	The Federal Chancellor has spoken out in favor of increasing the minimum wage to 15 euros. According to Scholz, the increase should take place in two stages.
EU adopts directive on corporate due diligence in the area of sustainability	27.05.2024	The directive on corporate due diligence in the area of sustainability (EU Supply Chain Directive) was finally adopted on May 24, 2024. The directive provides for companies to be held accountable for child labour, exploitation and environmental pollution in the production of their goods, among other things. Initially, the directive only applies to companies with more than 5,000 employees and a turnover of 1.5 billion euros. One year later, companies with 4,000 employees and a turnover of 900 million euros will also be covered, and after five years, companies with more than 1,000 employees and a turnover of 450 million euros will also be covered.
Electronic labour market admission: advance approval from the Federal Employment Agency now also possible digitally	28.05.2024	The Federal Employment Agency has digitized key steps of the labour market admission process. This was announced by the Federal Employment Agency in a press release dated May 24, 2024. Employers and foreign workers and skilled workers should benefit equally. Labour market admission is part of the visa process that people from third countries have to go through if they want to work in Germany. The Federal Employment Agency decides on their admission to the labour market. As a rule, it is involved in this process by the visa offices or immigration authorities. In certain cases, however, the Federal Employment Agency can check in advance - i.e. before a person applies for a visa - whether the requirements for employment in Germany are met. This check is requested by the future employer. If all requirements are met, the Federal Employment Agency issues a so-called preliminary approval.

Previously, employers sent the preliminary approval by post to the person they wanted to employ. However, not only was the original often lost in the post to the foreign skilled worker's country of origin. The postal dispatch also sometimes takes several weeks.

The number of labour market approvals has also increased in recent years. For example, more permits have been issued for people in the context of flight and asylum. However, other access routes, such as taking up an apprenticeship in Germany or the regulations within the framework of the so-called Western Balkans regulation, have also increased the number of approvals and thus the administrative workload for the Federal Employment Agency. In order to meet these challenges, a cross-agency digitalization push is needed.

The new eService for electronic labour market approval now promises to help.

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