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Employment Tracker 07/2024

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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		
Delayed acceptance compensation and vacation entitlements in connection with the facility-related vaccination obligation	19.06.2024 - 5 AZR 167/23 -	**If an employer has released an employee from work who did not meet the requirements of Section 20a (1) of the Infection Protection Act (IfSG old version) during the period of validity of the former Section 20a Infection Protection Act (IfSG old version), the periods of unpaid leave must be taken into account when calculating the annual leave. The employee is only entitled to a proportionally shorter vacation entitlement.** *This was decided by the 5th Senate of the Federal Labour Court.* Facts of the case The Federal Labour Court decided on the occasion of the facility-related vaccination obligation under Section 20a 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 decision of the Federal Labour Court

The Federal Labour Court ruled that the plaintiff has no claim to compensation for default of acceptance or to continued payment of wages in the event of illness and, in essence, was not entitled to an unreduced vacation entitlement for the period in question.

The 5th Senate of the Federal Labour Court stated that the leave of absence due to non-compliance with the requirements of Sec. 20a IfSG (old version) justified a recalculation of the holiday entitlement during the year. The days not worked because of this leave were not to be equated with periods of compulsory work. According to the case law of the Court of Justice of the European Union, the recreational purpose of the entitlement to paid annual leave presupposes that the employee has actually worked during the reference period. The situation is different only if the fact that the employee did not work is based solely on decisions made by the employer. This was not the case here because, on the one hand, the defendant had merely implemented the provisions of the IfSG (old version) with the exemption and, on the other hand, the plaintiff could have resumed her work after providing the

		proof required by law. The fact that she did not do so was based on her free and very personal decision not to be vaccinated against the corona virus. Note: In a similar case (5 AZR 192/23), the Fifth Senate also ruled that operators of care facilities may release employees who have not been vaccinated against the corona virus from work without continued payment of wages from March 16, 2022, to December 31, 2022. However, the Federal Labour Court ruled that employers were not entitled to give these employees a warning notice.
Compensation and damages due to (disputed) violation of data protection regulations and personal rights	20.06.2024 - 8 AZR 253/20 -	**The processing of health data by a medical service that has been commissioned by a statutory health insurance fund to prepare an expert opinion to dispel doubts about an insured person's inability to work may also be permitted under Art. 9(2) (h) GDPR if the insured person is one of the medical service's own employees. An employer that processes health data of its own employees as a medical service is not obliged to ensure that no other employee has access to these data.** *This was decided by the 8th Senate of the Federal Labour Court.* Facts of the case The Federal Labour Court had 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 decision of the Federal Labour Court

The Federal Labour Court has ruled that the basic requirements for a claim for damages under Art. 82 (1) GDPR were not met. In the opinion of the Federal Labour Court, there was already no violation of the provisions of the GDPR. The processing of the plaintiff's health data by the defendant was, overall, permissible under EU law. The processing was necessary for the preparation of the expert opinion commissioned by the statutory health insurance fund, which had its basis in national law, in order to dispel doubts about the plaintiff's incapacity for work within the meaning of Art. 9 (2) (h) GDPR.

The data processing also complied with the guarantees of Art. 9 (3) GDPR, as all of the defendant's employees who had access to the plaintiff's health data were subject to a professional duty of confidentiality or, in any event, to social secrecy, which the defendant's employees must also observe among themselves.

Union law does not contain any requirement in the aforementioned provisions that, in a case such as the present one, another medical service must be commissioned to prepare the expert opinion or that it must be ensured that, no other employee of the commissioned medical service has access to the health data of the person concerned. Corresponding restrictions on the processing of (health) data, which the Member States may introduce or maintain in accordance with Art. 9 (4) GDPR, are not contained in national (German) law.

The data processing carried out by the defendant is also lawful in other respects. It complies with the general conditions for lawful processing of Art. 6 GDPR, which applies in addition

	to Art. 9 GDPR. In addition, the organizational and technical measures taken by the defendant to protect the health data of its own employees in the performance of its statutory duties as a medical service comply with the principles of integrity and confidentiality enshrined in Union law.

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		
Works council co-determination in mandating headset use at work	16.07.2024 - 1 ABR 16/23 -	The Federal Labour Court decides whether an instruction to wear a headset at work is subject to co-determination by the works council. The employer - an international clothing company - wanted to replace the previously used Walki Talkies with headsets. The software used for the headsets is managed by the central IT department in Dublin. A general works agreement on the introduction of ICT systems, data protection and information security was concluded with the general works council, which includes a system agreement on the use of headsets. This system agreement stipulates that headsets may not be used to monitor conduct or performance. In the individual companies, company agreements on the use of headsets have largely been concluded with the local works councils. However, no final agreement has been reached with the local works council concerned. The local works council is of the opinion that the introduction of headsets is subject to co-determination pursuant to Sec. 87 (1) No. 6 of the German Works Constitution Act (BetrVG). Performance and behaviour are monitored. By the possibility of listening to all communications, the individual employee could be monitored. The employer, on the other hand, is of the opinion that it is not the local works council but the central works council that is responsible, since a company-wide regulation is necessary due to the central processing in the IT department in Dublin. In addition, monitoring was not possible because the headsets were not assigned to specific employees.

	The lower courts rejected the local works council's claim. The Regional Labour Court of Saxony (decision dated October 21, 2022 - 4 TaBV 9/22) essentially held that the local works council had no right of co-determination under Sec. 87 (1) No. 6 BetrVG with respect to the introduction of the headsets. It is not evident that the behaviour and performance data of the employees are monitored. It was not objectively possible to monitor performance by means of voice transmission via headsets. In addition, it was not possible to individualize employees because the headsets were indisputably not assigned to a specific employee. The local works council appealed the decision to the Federal Labour Court.

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
Expanding video hearings in labour court cases	14.06.2024	On June 14, 2024, the German Bundestag approved the Mediation Committee's proposed agreement on the law to promote the use of videoconferencing technology in civil and special jurisdictions. According to the press release issued by the German Bundesrat on June 12, 2024, the proposed agreement stipulates that video hearings should be possible in all affected jurisdictions only if the cases are suitable and sufficient capacity is available. If these conditions are met, the presiding judge may permit and order video hearings for the parties and their representatives. If he orders a video hearing, a party to the proceedings may object within two weeks. If a party requests a video hearing, the presiding judge should grant the request.

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