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Employment Tracker

September 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		
Compensates for changing, traveling, and body cleansing time	23.04.2024 - 5 AZR 212/23 -	**Time spent cleaning the body is part of the compensable working time if the employee becomes so dirty during the performance of the work that he cannot reasonably be expected to put on his private clothes, leave the company and go home without first cleaning his body in the company.** *The 5th Senate of the Federal Labour Court decided this in April this year. The reasons for the decision were recently published.* Facts The parties are in dispute over the plaintiff's entitlement to compensation for time spent traveling, changing clothes, and cleaning. The plaintiff is employed by the defendant employer as a container mechanic. On a normal working day, the plaintiff first enters the building containing the locker room, the time recording terminal and his workplace. Before entering the building containing the locker room, the plaintiff's presence is electronically recorded. The plaintiff picks up his work clothes on the second floor and then goes to the locker room to change. Plaintiff then goes to his workstation and logs on to the time clock on the way there. The plaintiff is not required to enter the time at which he enters the facility or the locker room, but rather the time at which his shift begins or ends, as specified in the shift schedules. At the end of his shift, he clocks out, goes to the locker room to shower and change, and then begins his commute home.

The plaintiff now seeks additional compensation for the actual days worked. He claims that in addition to the time worked at the workplace, the defendant should pay for the time spent walking from the gate to the locker room, changing clothes, walking from the locker room to the workplace, walking from the workplace to the locker room, cleaning, showering and changing clothes, and walking from the locker room to the gate, totalling 55 minutes per working day.

The Respondent countered that the time claimed was not compensable working time. This follows from the relevant collective bargaining agreement and an applicable general works agreement. An obligation to pay remuneration could also not be derived from Section 611a (2) of the German Civil Code (BGB). Showering was neither required nor necessary for reasons of health protection.

The decision of the Federal Labour Court

The Federal Labour Court ruled that the time spent changing within the company, the time spent traveling from the locker room to the workplace and back, and, under certain conditions, the time spent cleaning the body also constitute working time subject to remuneration.

Putting on and taking off work clothes prescribed by the employer and only to be worn in the company, and the time spent doing so, are based on the employer's corresponding instructions to wear the work clothes and therefore regularly constitute working time subject to remuneration. The same applies to the plaintiff's travel time from the locker room to the workplace and back, as the plaintiff does not have the opportunity to put on and take off his work clothes at the workplace.

According to the Federal Labour Court, personal cleaning time is to be considered working time if it is directly related to the actual activity or the manner in which it is performed and thus serves exclusively to satisfy an external need. Such a direct connection is to be assumed if the employer expressly orders personal hygiene or if mandatory health and safety regulations require it, for example because the employee comes into contact with hazardous substances or contaminated objects at work.

However, time spent cleaning the body is also compensable working time if the employee becomes so dirty in the course of his work that he cannot reasonably be expected to put on his private clothes, leave the company and go home without first cleaning his body in the

		company. Showering times are subject to compensation if the employee is engaged in very dirty work or work with highly odorous substances, wears personal protective equipment covering a large area of the body, or works in special climatic conditions or in wet conditions. The obligation to pay for time spent changing clothes, cleaning the body and travelling is also not excluded by the relevant collective agreement or the applicable general works agreement.
Right to extra pay for working on a public holiday for training purposes in a federal state in which there is no public holiday?	01.08.2024 - 6 AZR 38/23 -	**For employees covered by the collective agreement for the public service of the federal states (TV-L), the entitlement to a public holiday bonus depends on whether there is a public holiday at the regular place of work.** *The 6th Senate of the Federal Labour Court decided this.* Facts It was disputed whether there is a collectively agreed public holiday premium even if the work is performed at a place of work for which no public holiday is specified. The plaintiff is employed by the defendant hospital in North Rhine-Westphalia. On November 1, 2021, the plaintiff attended a training course in Hessen. All Saints Day on November 1 is a public holiday in North Rhine-Westphalia, but not in Hessen. The defendant hospital credited the plaintiff for the hours worked on November 1, 2021, but did not pay any holiday bonus. The plaintiff is suing for the unpaid holiday bonuses. He is of the opinion that the legal and factual circumstances at the usual place of work, i.e. North Rhine-Westphalia, are decisive for the calculation of the collectively agreed holiday pay (Sec. 8, Subsection 1, Sentence 2, Letter d), in the version of § 43, No. 5, Subsection 1, Letter d), of the TV-L. 1 sentence 2 letter d) TV-L). The defendant hospital, on the other hand, is of the opinion that the entitlement to the payment of a holiday premium requires the actual performance of work at a workplace for which a holiday has been established.

The Labour Court ruled in favour of the plaintiff, while the Regional Labour Court ruled in favour of the defendant hospital. In his appeal to the Federal Labour Court, the plaintiff is still seeking payment of the holiday premium.

The Decision of the Federal Labour Court

The Federal Labour Court ruled that the plaintiff was entitled to the requested holiday bonuses.

The 6th Senate based its decision primarily on the fact that the regular place of employment, which in this case was in North Rhine-Westphalia, is decisive for the entitlement to holiday pay under the collective bargaining agreement for public services (TV-L).

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		
Cancellation of a personnel action **Permission required for employment in a company temporarily without a works council**	24.09.2024 - 1 ABR 28/23 -	The Federal Labour Court decides whether the newly formed works council should have had a say in the hiring process even though it had not yet been formed at the time the contract was concluded. In particular, it is disputed whether the decisive point in time for hiring is the conclusion of the contract or the actual integration into the company. The employer in question drew up an employment contract for an applicant who had already signed it. At that time, there was no works council in the company because it had been dissolved. Two days after the employment contract was drawn up, an election for a new works council was held. On the same day that the election results were announced, the candidate selected by the employer received the employment contract documents. Two days later, the candidate signed the employment contract. On the same day, the constituent meeting of the applicant works council was held. In February 2022, the employer informed the works council about the new appointment as of March 1, 2022. The works council is of the opinion that the appointment requires its consent. The relevant point in time for the term "hiring" within the meaning of Sec. 99 (1) Sentence 1 BetrVG, is not the conclusion of the employment contract, but the actual integration into the company. At the time of the planned integration on March 1, 2022, it already existed as a works council and should therefore have been involved. The works council therefore requests that the measure be revoked. The employer argues that its decision to hire the employee was made during the period without a works council. At best, the time of the conclusion of the contract should be taken

		into account, as a final decision was made at that time that could not be easily revised. However, the contract had already been concluded orally at the end of December 2021. In any event, the plaintiff had signed the written employment contract before the constituent works council meeting. The works council's opinion would mean that the employer would not be obliged to carry out any personnel measures during the period without a works council. The lower courts granted the works council's request. The employer is appealing this decision.
Effectiveness of a Works Council Election by Mail Ballot Only	25.09.2024 - 7 ABR 23/23 -	The validity of a works council election is in dispute, and in particular the question whether the election regulations of the Works Constitution Act permit a general postal ballot. The petitioners are employees of the participating employer who are entitled to vote. The employer operates discount grocery stores throughout Germany, some of which are located far from each other. In March 2022, the works council formed in the previous election period for the Northwest district appointed a nine-member election committee, which issued an election notice stating that it had decided to hold a written/mail ballot for all employees. The works council election was then conducted as a mail-only election with a postage-paid return envelope through Deutsche Post. The petitioners seek to have the election of the works council for the Northwest district declared null and void. In particular, they claim that the election regulations of the Works Constitution Act do not provide for a general postal ballot. The works council and the employer consider the election to be valid. The lower courts dismissed the petition to set aside the election. The petitioners are appealing this 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
Reducing bureaucracy: Age limitation in text form?	19.06.2024	On June 19, 2024, a draft amendment to the government's Fourth Bureaucracy Elimination Law was published. This amendment adds a labour law aspect to the draft. The drafting aid provides for the following new paragraph 2 to be added to Sec. 41 SGB VI *"An agreement that provides for the termination of the employment relationship upon reaching the statutory retirement age must be in text form in order to be valid. Sec. 14 (4) of the Law on Part-Time and Fixed-Term Employment Contracts shall not apply".* This amendment would pave the way for the use of text form for employment contracts with age limit agreements that previously required written form.

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