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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		
Co-determination of the works council when ordering the wearing of headsets at work	16.07.2024 - 1 ABR 16/23 -	**A headset system that enables supervisors to listen in on communication between employees is a technical device that is intended for monitoring employees within the meaning of Section 87 (1) no. 6 of the German Works Constitution Act (BetrVG). Its introduction and use is also subject to co-determination at the workplace if the conversations are not recorded or stored.** *This was decided by the 1st Senate of the Federal Labour Court in July of this year and the reasons for the decision were recently published.* Facts The Federal Labour Court had to decide whether the order to wear a headset during work is subject to co-determination by the works council. The employer - an international clothing company - intended to replace the Walki Talki's previously used 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. It stipulates that the headsets are not to be used to monitor behaviour and performance. Works agreements with the local works councils were largely concluded in the individual companies on the use of headsets. However, a final agreement was not reached with the local works council involved.

The local works council involved is of the opinion that the introduction of headsets is subject to co-determination pursuant to Section 87 (1) No. 6 BetrVG. Performance and behaviour are being monitored. By 'listening in' on all communication, 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 general works council that is responsible, as a company-wide regulation is absolutely necessary due to the centralised processing in the IT department in Dublin. Furthermore, monitoring was not possible because the headsets were not assigned to specific employees.

The decision of the Federal Labour Court

The Federal Labour Court has ruled that headset systems can constitute a technical device which, due to its possible uses, is intended to monitor the behaviour or performance of employees, so that the introduction of such systems may require the co-determination of the works council pursuant to Section 87 (1) No. 6 BetrVG.

However, the fact that the headset system is suitable and intended to monitor the behaviour or performance of employees does not already result from the fact that the employees of the central IT department in Dublin can access certain device-related data via the Internet portal, as the data cannot be assigned to individual employees.

However, the headset system is therefore suitable for monitoring and thus also intended within the meaning of Section 87 (1) no. 6 BetrVG because the managers working in the branch can use it to listen in on the communications of other employees who are also using a headset at any time. The simultaneous transmission of the spoken word to all users makes the business communication taking place in the company technically accessible to an extent that would not be possible without the use of the system. The supervisors on site are therefore always able to take note of the behaviour of all employees using a headset during a shift and thus check it. As a result, these employees are exposed to constant monitoring pressure.

Federal Social Court

Insurance obligation for teachers and lecturers always depends on the individual case.	05.11.2024 - B 12 BA 3/23 R	**Whether lecturers are employed and subject to social security contributions depends on the specific circumstances of each individual case. There is no established and long-standing case law according to which a teaching activity would always be regarded as self-employed in the case of a corresponding agreement.** *This was decided by the 12th Senate of the Federal Social Court.* *– Communicated by press release of 06.11.2024 –* Facts The parties are in dispute as to whether there is an obligation to be insured under the statutory pension insurance scheme in the case of agreed freelance work. The plaintiff is an adult education centre and offers, among other things, courses to prepare for obtaining a secondary school leaving certificate via the second-chance education route. A lecturer worked as an honorary lecturer for these courses. He taught the students economics and politics. The adult education centre had no right to issue instructions to the student - in accordance with the terms of the contract. It provided the classrooms and co-ordinated the timetable with the student and the other lecturers. The lecturer organised the lessons independently. He regularly sent an assessment of the performance of the individual students to the head of the department. The defendant (German Federal Pension Insurance) determined that the defendant was liable for social insurance contributions under the statutory pension insurance scheme from August 2017. The decision of the Federal Social Court This was declared correct by the Federal Social Court. According to the relevant circumstances of the individual case, the student was subject to compulsory insurance in the statutory pension insurance scheme at least for a certain period of time due to employment. The claimant could not invoke the protection of legitimate expectations. There is no previous established and long-standing case law according to which a teaching activity - in particular as a lecturer at an adult education centre - would always be regarded as self-employed if a

	corresponding agreement had been made. The individual nature of status decisions already precludes the protection of legitimate expectations. The distinction between employment and self-employment is not made in the abstract for certain professions and activities. In particular, the features that characterise entrepreneurial leeway cannot be defined independently of the individual case and developments on the labour market. Protection of legitimate expectations also does not arise from the indication of the will of the parties. In this respect, this is a dynamic further development of the case law on the concept of employment.

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		
Delayed acceptance compensation - obligation to submit proof of vaccination or health status within the meaning of Section 20a (1) IfSG	04.12.2024 - 5 AZR 30/24 -	The parties are in dispute as to whether the employee is entitled to default of acceptance wages if the employer releases him from work during the coronavirus pandemic due to a lack of proof of vaccination or recovery without the health authority having issued a ban on entering or working. The plaintiff is employed by the defendant as a nursing specialist in a senior citizens' centre, which is a fully inpatient facility for the care and accommodation of elderly people and people in need of care. In March 2022, the defendant released the plaintiff from the obligation to perform work - without continued remuneration - because employers were required by law to comply with the vaccination obligation for all employees in care facilities and the plaintiff was unable to present a coronavirus vaccination. The defendant then reported the plaintiff's failure to provide proof of vaccination to the public health department, which recommended that the defendant refrain from deploying the plaintiff in close proximity to patients until the matter had been conclusively clarified. In his lawsuit, the plaintiff has applied for payment of remuneration for the period from March to December 2022. He is of the opinion that his release from the obligation to perform work does not release the defendant from its obligation to pay remuneration. As long as the health authority does not issue a ban on entering or working, the defendant must fulfil its obligation to employ him.

		The defendant believes that it was neither possible nor reasonable for it to employ the plaintiff. He did not fulfil the statutory activity requirement pursuant to Section 20a (1) IfSG. The impossibility of performing the work led to the cancellation of the claim for remuneration. The plaintiff was unsuccessful in the lower courts (e.g. LAG Lower Saxony, judgement of 18.12.2.2023 - 4 Sa 166/23).
Authorisation to offset time credits on an hourly account with minus hours on the annual target time account	04.12.2024 - 5 AZR 277/23 -	It is disputed whether the employer is authorised to offset the time accounts held for the plaintiff against each other without his consent. The plaintiff works for the defendant as a control centre dispatcher for the airport fire brigade. The company has a company agreement which stipulates that hours worked in addition to the shifts are credited to a separate account (time account). If 16 hours are accumulated in the hourly account, these can be deducted as a shift from the target account or added to the working time account in accordance with the company agreement. The plaintiff was to be scheduled for 120 shifts of 24 hours per year. The defendant repeatedly failed to comply with this. Instead, it unilaterally booked the hours from his hours account to the debit account to compensate for the missing shifts without the plaintiff's consent, relying on the company regulations. The Cologne Labour Court dismissed the action, while the Regional Labour Court (LAG Cologne, judgement of 11.07.2023 - 4 Sa 359/23) ruled in favour of the plaintiff. The Regional Labour Court essentially based its decision on the fact that the defendant was not entitled to unilaterally offset credit balances on the working time account against open hours on the debit account because there was no corresponding basis for a claim. The relevant provision in the company agreement on working hours does not constitute a sufficient basis for a claim. Even if the interpretation of the provision allowed unilateral offsetting, the provision in the company agreement was invalid. If the employee is not free to decide whether and how many shifts are assigned to him, such a provision unlawfully shifts the operational risk to the employee.

Compensation pursuant to Section 15 (2) AGG for non-payment of overtime bonuses	05.12.2024 - 8 AZR 370/20 -	The parties are in dispute regarding a claim for compensation pursuant to Section 15 (2) of the German Equal Treatment Act (AGG). 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 collective labour 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 is seeking compensation pursuant to Section 15 (2) AGG in the amount of a quarter's earnings for the failure to pay overtime bonuses on the grounds that the defendant discriminated against her as a part-time employee because of her 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 plaintiff was unsuccessful in both lower courts (including LAG Hessen, judgement of 19 December 2019 - 5 Sa 436/19) with regard to compensation in accordance with Section 15 (2) AGG. On 28 October 2021, the BAG initiated preliminary ruling proceedings with the European Court of Justice (in the result ECJ, judgement of 29 July 2024 – C-184/22 and C-185/22). The Federal Labour Court will now decide in light of the European Court of Justice's ruling.
Effectiveness of a Probationary Termination in the Context of a	05.12.2024 - 2 AZR 275/23 -	The parties are in dispute about the effective termination of an existing employment relationship between them.

Fixed-Term Probationary Employment Relationship	The plaintiff was hired by the defendant, which operates a car dealership, as a service advisor and master mechanic on 1 September 2022. The employment contract stipulated that he would initially be employed on a trial basis until 28 February 2023. The probationary employment relationship was then to end without notice. In the event that the employment relationship continued after the end of the probationary period, it was to be concluded for an indefinite period. It was also agreed in the employment contract that the employment relationship could be terminated in writing during the probationary period with two weeks' notice and that the statutory notice periods would otherwise apply. The employer terminated the employment relationship in writing with effect from 11 November 2022, against which the employee filed an action for unfair dismissal on 16 November 2022. The plaintiff argued that the termination was invalid as no termination option had been agreed in the fixed-term employment contract. Furthermore, no probationary period had been agreed, although this should have been a maximum of two months due to Section 15 (3) TzBfG. The defendant did not terminate the contract with notice, but declared a termination of its own kind during the probationary period as of 11 November 2022. In the alternative, the defendant did not give notice of termination at the next possible point in time, which is why the employment relationship continued without notice. The defendant is of the opinion that a probationary period and a corresponding termination option were expressly agreed in the employment contract. The “proportionality” of the probationary period and probationary notice period cited by the plaintiff is irrelevant. Even if one followed the plaintiff's opinion, the employment relationship would have ended at the latest upon expiry of the ordinary statutory notice period. A probationary period termination is an ordinary termination. The plaintiff was unsuccessful in both instances (including LAG Schleswig-Holstein, judgment of 18.10.2023 - 3 Sa 81/23). The defendant is of the opinion that a probationary period and a corresponding termination option were expressly agreed in the employment contract. The ‘proportionality’ of the probationary period and probationary notice period cited by the plaintiff is irrelevant. Even if one followed the plaintiff's opinion, the employment relationship would have ended at the

	latest upon expiry of the ordinary statutory notice period. A probationary period notice of termination is an ordinary notice of termination. The plaintiff was unsuccessful in the lower courts (including LAG Schleswig-Holstein, judgement of 18 October 2023 - 3 Sa 81/23). In his appeal to the Federal Labour Court, the plaintiff continues to seek a declaration that the termination of his probationary period is invalid.

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
4th Bureaucracy Reduction Act published in the Federal Law Gazette	29.10.2024	The 4th Bureaucracy Reduction Act was published in the Federal Law Gazette on October 29, 2024. However, the changes relevant to employment law practice will not take effect until January 1, 2025. An overview of the most important changes in employment law: ▪ In the future, text form will be sufficient for evidence under the Employment Evidence Act if certain requirements are met. ▪ The law provides for further formal simplification for fixed-term employment for older workers: In the future, the text form will also be sufficient for fixed-term contracts for older employees. ▪ In the future, employees will also be able to assert their claim to parental leave (Section 16 of the Act on Parental Leave) and their claim to part-time work during parental leave (Section 15 (7) of the Act on Parental Leave) in text form. ▪ The written form requirement for temporary employment contracts between the temporary employment agency and the hirer will also no longer apply. Text form will now suffice. ▪ In the future, references may be issued in electronic form with the employee's consent.
Entry into force of the Sixth Ordinance on a Wage Floor in the Temporary Employment Sector	30.10.2024	On October 30, 2024, the Sixth Ordinance on a Wage Floor in the Temporary Employment Sector was published. It comes into force on November 1, 2024 and applies until September 30, 2025. The ordinance provides for the following minimum hourly rates of pay:

		▪ From the entry into force of the regulation, November 1, 2024, until February 28, 2025: EUR 14 / gross per hour ▪ From March 1, 2025 to September 30, 2025: EUR 14.53 / gross per hour These minimum hourly rates are binding for all temporary agency workers employed in Germany, including those posted to Germany by employers in the sector based abroad.
Draft law on the early integration of asylum seekers into the labour market	05.11.2024	On 5 November 2024, the Free State of Bavaria presented its draft law on the early integration of asylum seekers into the labour market. The aim is to avoid a further increase in the financial burden of asylum seeker benefits by getting asylum seekers who are able to work into employment as early as possible. The draft bill contains the following changes, among others: ▪ By amending Section 61 of the German Asylum Act, asylum seekers are to be granted access to the regular labour market after just three months. Unlike previously, this is to apply regardless of whether they are obliged to live in a reception centre or are already accommodated in follow-up accommodation. ▪ The existing grounds for exclusion from entitlement to employment will be retained. This is intended to ensure that those who have no prospects of remaining in Germany are denied access to the labour market.
Draft law to modernise and digitalise the fight against illegal employment	08.11.2024	On 8 November 2024, the Federal Government presented its draft bill to modernise and digitalise the fight against undeclared work. The aim is to set up the customs administration's Financial Control of Undeclared Work (FKS) in a way that is fit for the future so that its work becomes even more efficient and effective. Regulatory projects at a glance: In particular, this draft is intended to create the basis for a risk-orientated inspection approach by the FKS. ▪ By using a new information and data analysis system, the FKS is to systematically analyse large volumes of data with regard to existing risks for the occurrence of undeclared work and illegal employment and be able to derive a risk assessment from this.

		▪ The statutory black labour priority sectors are to be adapted in order to pay closer attention to infringements in the risk areas that have recently attracted particular attention. Hairdressing salons will be added to the sector catalogue; companies in the forestry sector will be removed from the sector catalogue. ▪ The fight against organised forms of illegal employment and organised crime is to be improved through the participation of the FKS in the police information network. ▪ Violations are to be punished more efficiently by the FKS through an expansion of competences in the independent conduct of investigation proceedings by eliminating the time-consuming upstream submission requirement and allowing the FKS to conduct investigation proceedings independently and oversee corresponding court proceedings. ▪ Furthermore, the data of employers based abroad that must be reported via the minimum wage reporting portal will be adjusted.
Adoption of an ordinance amending the Hazardous Substances Ordinance and other occupational health and safety ordinances	13.11.2024	On 13 November 2024, the Federal Cabinet adopted the ordinance amending the Hazardous Substances Ordinance and other occupational health and safety ordinances. The new regulations are due to come into force this year. The aim is to promote occupational health and safety. The ordinance contains the following regulations at a glance: **Updating the regulations on carcinogenic hazardous substances in the Hazardous Substances Ordinance** ▪ On the one hand, this concerns the risk concept for activities involving carcinogenic hazardous substances, which is now fully incorporated into the Hazardous Substances Ordinance. ▪ Important elements here are the requirements for activities in the high-risk area and notification obligations to the competent authority. **Adaptation of the regulations on asbestos in accordance with the results of the national asbestos dialogue** ▪ This relates in particular to the regulations on authorised activities and requirements for employee qualifications.

		Amendment of the PPE (personal protective equipment)**-Utilisation Ordinance and the Biological Agents Ordinance** ▪ Serves in each case to adapt a reference to the current European legal situation.
Federal Cabinet Approves Law to Ensure Compliance with Collective Bargaining Agreements	27.11.2024	The Federal Cabinet has approved the Collective Bargaining Act presented by Federal Ministers Hubertus Heil and Robert Habeck. This was announced by the Federal Ministry of Labour and Social Affairs in a press release. Important changes at a glance: ▪ Introduction of a new Federal Collective Bargaining Act: Public contracts and concessions awarded by the Federal Government above a threshold value of 30,000 euros for supply and service contracts and service concessions and 50,000 euros for construction contracts and construction concessions will only be awarded to companies that undertake to guarantee the collectively agreed working conditions set out in the relevant statutory ordinance for the employees employed to execute the contract. ▪ Online works council elections: As part of a trial during the regular works council elections to be held between March 1 and May 31, 2026, companies that already have a works council will be given the opportunity to vote electronically in addition to the existing forms of voting.

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