HEUKING KÜHN LÜER WOJTEK

Newsletter
Employment law

April 2012

New Year Changes:
Minimum Wage for Temp Work

Duty to Ascertain Whether Open Positions
Can Be Filled With Severely Handicapped Persons

Works Council Must Sign In and Out

Impermissible Age Discrimination
in Collective Bargaining Compensation Provisions

No Multiple Caregiver Leave

The Phrase "Came to Know" in References

Rescission of Termination Agreements

Loss of Vacation Time in Cases of Disability –
New Jurisprudence

LAWYERS AND TAX ADVISORS
Berlin Brussels Chemnitz Cologne Düsseldorf Frankfurt Hamburg Munich Zurich

New Year Changes: Minimum Wage for Temp Work

After long discussion, a minimum wage applies for the first time to temp work as of January 1, 2012. It is EUR 7.01 in the East and EUR 7.89 in the West. As of November 1, 2012, wages will be raised to EUR 7.50 in the East and EUR 8.19 in the West.

The place of work determines the East/West floor. To prevent misuse, employees working outside the place of business will have the right to the wage applicable to the place where they were engaged, if higher.

Duty to Ascertain Whether Open Positions Can Be Filled With Severely Handicapped Persons

Federal Labor Court, Judgment of October 13, 2011 – 8 AZR 608/10

Employers are obligated to ascertain whether they can fill open positions with severely handicapped persons and in this respect must make timely contact with the Federal Labor Agency, in order to avoid creating a presumption of discrimination pursuant to the General Act on Equal Treatment.

The plaintiff, who had a degree of disability of 60, applied at the defendant municipality for the advertised position in the departments of human resources, land-use planning, real estate and regulatory agency. The position was to be filled as a replacement for maternity leave. The plaintiff had professional training in business, college studies in business management and had completed his education for high-level civil service. He indicated in the application that he was not restricted by his handicap. The defendant municipality hired another person to fill the position, without first ascertaining whether the open position could be filled with a severely handicapped person or contacting the Federal Labor Agency in this respect. The plaintiff considered himself discriminated against and sued for commensurate damages, at minimum three months' gross salary.

After the lower courts had dismissed the complaint, the Federal Labor Court ruled that the defendant had shown a presumption of discrimination. Pursuant to Section 81 (1) of Social Security Code IX, employers are obligated to ascertain whether open positions

Duty to Ascertain Whether Open Positions Can Be Filled With Severely Handicapped Persons

can be filled with severely handicapped persons, in particular by unemployed or job-seeking severely handicapped persons registered with the Labor Agency. According to Section 81(1) sent. 2 of Social Security Code IX, employers must contact the Labor Agency in a timely manner. This statutory duty applies to all employers and not only to the civil service sector, regardless of whether a severely handicapped person has applied or disclosed such status in his application. If an employer violates this duty, it creates a presumption of having discriminated against the rejected severely handicapped person because of his disability. In this particular case, the employer was not able to rebut the presumption of such discrimination. The Federal Labor Court therefore remanded the matter to the Higher Labor Court to determine the amount of damages due to the plaintiff.

Conclusion: If a position is to be filled, the employer should inquire at the Labor Agency as soon as possible whether there is suitable severely handicapped/equivalent job seeker for the position. Otherwise, there is the risk of raising a presumption that the employer has discriminated against a rejected severely handicapped person on account of his disability. If this duty is not complied with, the employer must rebut the resulting presumption in any lawsuit. If it is unsuccessful, it faces a damages claim pursuant to Section 15(2) of the General Act on Equal Treatment.

Works Council Must Sign In and Out

Federal Labor Court, Order of June 29, 2011 – 7 ABR 135/09

A works council member must sign out for works council activities during employment hours – whether undertaken at or outside the workplace. This allows the employer to cover the work stoppage. If the works council member has not signed out in advance, he must subsequently inform the employer at its request of the total time spent on works council activity undertaken within a certain period of time.

An employer instructed the works council that their members were to sign in with him prior to engaging in works council activities and sign back in after the works council activities were

Works Council Must Sign In and Out

finished, even if they did not have to leave the workplace for this purpose. The works council attempted an unsuccessful challenge in three courts.

The Federal Labor Court first reiterated the settled law whereby a works council member must always sign in and out with the employer when he is leaving the workplace for works council activities. The Federal Labor Court then emphasized that every employee, including works council members, is obligated by virtue of a collateral employment law duty to the employer to always sign and in out when contractual work duties will not be performed. This reporting duty is meant to enable the employer to mitigate the resulting work stoppage through organizational or other means and thus keep the business running.

As a result, the Federal Labor Court found that the works council was obligated to have its members always sign in and out, even when they were not actually leaving the workplace. As a restriction, the Federal Labor Court pointed out that this reporting duty could not arise if, in a particular instance, a reorganization of work arrangements was not possible. If a works council member was not accordingly obligated to sign in and out, he must nevertheless inform the employer afterwards of the total time spent on works council activities within a certain period of time.

Conclusion: In case of doubt, the works council is always obligated to sign in and out with the employer for works council activities. The insistence on this duty does not infringe on the rights of the works council. If in a particular instance, no obligation to sign out prior to beginning works council activity arises as the result of a particular situation, the works council must disclose to the employer afterwards the total duration of work time used for works council activities. The logging and summarization of such "absences" does not require the consent of the works council; it is statutorily based in Section 37(2) of the Works Constitution Act and can therefore also be implemented by the employer.

Impermissible Age Discrimination in Collective Bargaining Compensation Provisions

European Court of Justice, Judgement of September 8, 2011 – C-297/10 und C-298/10; Federal Labor Court, Judgement of November 10, 2011 – 6 AZR 148/09

The BAT/BAT-O [Federal Collective Agreements for contractual employees] assessment of basic pay according to age categories violates the European law prohibition against discrimination on account of age. This results in employees being able to claim pay according to the highest age category of their respective salary group. The transition via collective agreement to the non-age-based wage structure of the TV-L (Collective Agreement for public service) is, on the other hand, in conformance with Age category

Both the BAT and the BAT-O provide for assessment of basic pay for relative salary groups according to age. An employee subject to this aspect of the collective agreements, who was not classified in the highest age category of his salary group, filed a complaint and requested classification in the highest age category or the determination that his (public law) employer was/is obligated to pay him according to the highest age category.

In response to the Federal Labor Court's reference for a preliminary ruling, the ECJ ruled that the assessment of basic pay for an employee in public service according to age category violates the prohibition against age discrimination contained in the European Charter of Fundamental Rights and could also not be justified because a collective bargaining provision was at issue. To the extent the right to collective bargaining also contained in primary European law was also at issue, in the application of EU law, it must be exercised in harmony with the latter. Therefore, the social partners must observe the relevant European legal guidelines in the enactment of measures (as well as in the termination of collective bargaining agreements) that fall under the scope of the discrimination prohibitions. This was not the case here.

On this basis, the Federal Labor Court ruled in a decision dated November 10, 2011 that classification according to age categories was invalid. In further development of its prior jurisprudence, it then clarified that the impermissible discrimination could be remedied only by classifying all employees in the highest age category of their respective salary groups or by paying them compensation according to the highest age category of their salary group.

Impermissible Age Discrimination in Collective Bargaining Compensation Provisions

Under European law, according to the ECJ's remarks, the transition to the TV-L through special collective agreements is permissible. The wage system there does not provide for age categories. Nevertheless, in the framework of the collective bargaining transition provision, there is a link to the earlier age-discriminating compensation through the creation of so-called "compensatory pay" in order to ensure that, when employees are newly classified in the new collective compensation system, their vested rights are preserved and they maintain their prior compensation. According to the ECJ, this once again constituted indirect age discrimination on the facts. Still, by way of exception, this was justified and thus legally permissible because the collective bargaining parties had limited themselves to appropriate and necessary means for the preservation of vested rights. The ECJ therefore found that a collective bargaining age-discriminating compensation system could be replaced with a non-discriminatory compensation system supported by objective criteria, without violating European laws. At the same time, a few of the discriminating effects of the old system could continue for a temporary transitional period in order to secure for employees already in an employment relationship a transition to the new system without loss of income.

Conclusion: Assessment of income according to age under the BAT/BAT-O violates European law (including primary law) and is invalid to this extent. The discrimination against younger employees can only by remedied by them receiving/having received compensation according to the highest age category of their salary group for the period of application of the age-discriminating system. Nevertheless, a transition to a new, non-discriminatory compensation system tied to the prior age-discriminating system is permissible, when this is appropriate and necessary in order to preserve the vested rights of employees under the prior compensation system. It follows that the Federal Labor Court will expressly confirm the permissibility of corresponding collective bargaining transitional rules in its still pending case, 6 AZR 319/09.

No Multiple Caregiver Leave

Federal Labor Court, Judgment of November 15, 2011 – 9 AZR 348/10

Pursuant to Section 3(1) of the Act on Caregiver Leave (the "Caregiver Act"), employees in businesses with more than 15 employees are relieved of their work duties completely or partially when they are taking care of a close relative in need of care at home. The amount of leave for each close relative in need of care is a maximum of six months (Section 4(1) sent. 1 of the Caregiver Act) and can only be taken once for each such person.

In February 2009, an employee told his employer that he would be taking care of his mother in need of care at home for the period of June 15 to 19, 2009, under his right to caregiver leave pursuant to Section 3(1) of the Caregiver Act. The employer consented. By further correspondence dated June 9, 2009, the employee advised that he would also be taking care of his mother on December 28 and 29, 2009. The employer did not consent, advising that the employee was not entitled to take caregiver leave in multiple periods for the same relative in need of care. The employee's challenge was unsuccessful at all three court levels.

Like the lower courts, the Federal Labor Court ruled that caregiver leave pursuant to Section 3 of the Caregiver Act could only be taken once over an uninterrupted period of time up to a total of no more than six months. Section 3(1) of the Caregiver Act grants the employee a one-time right to alter a legal relationship that is exercised by communicating to the employer that caregiver leave is being claimed. With the first taking of caregiver leave, the right is extinguished. The same applies when the caregiver leave requested exceeds the maximum period of six months.

Conclusion: Caregiver leave pursuant to Section 3 of the Caregiver Act is a maximum of six months for each close relative in need of care and can only be claimed once. If employees nevertheless request multiple leave for one and the same person, the employer may refuse on the basis of the November 15, 2011 decision of the Federal Labor Court. Should the employee subsequently fail to appear at work, the employer may, at minimum, issue a warning for an unexcused absence from work and reduce wages accordingly.

The Phrase “Came to Know” in References

Federal Labor Court, Judgment of November 15, 2011 – 9 AZR 386/10

The phrase “came to know” in a reference does not allow for an inference of the lack of the quality attested to when it is otherwise contained in a positive reference.

The plaintiff was employed in the SAP Competence Center of the defendant. The reference provided to the plaintiff when he left his job contained the following wording:

“We came to know the plaintiff as a very interested and highly-motivated employee, who always demonstrated a very high level of readiness for duty. The plaintiff was always prepared to work above and beyond regular working hours for the needs of the company. He always executed his tasks to our complete satisfaction.”

The plaintiff challenged the phrase “came to know“ and argued that this phrase was overwhelmingly negatively understood. The employer was thus allegedly stating in a coded manner that precisely the opposite of the respective statement was true.

An employee’s right to a written reference upon termination of the employment relationship arises under Section 109(1) of the Industrial Code. The contents of the reference must meet the requirements of accuracy and clarity. Neither the choice of words nor omissions should lead third parties, the readers of the reference, to draw conclusions that do not correspond to the truth. Accordingly, the reference may not contain any phrases whose purpose is to make statements about the employee other than those evident from the external form or choice of words. The requirement of reference clarity forbids the use of “secret codes” in the wording of the reference.

The plaintiff was unsuccessful on appeal. In the view of the Federal Labor Court, the phrase “came to know“ does not permit the inference of the opposite of the quality attested to. From the point of view of the objective recipient’s mind, the phrase does not give the impression that the defendant is in fact attributing a lack of interest and motivation to the plaintiff.

The Federal Labor Court thus followed the view of the Cologne Higher Labor Court, which had recognized the potential ambiguity of the phrase “came to know” and dealt with the issue.

The Phrase "Came to Know" in References

Accordingly, however, because the disputed phrase "came to know" in the instant case was contained in otherwise consistently positive formulations and in an altogether good reference, there was no room for the assumption that a hidden negative judgment was at issue. Rather, the reference confirmed that the defendant actually considered the plaintiff to be a very interested and highly motivated employee and also sought to attribute this to him as positive qualities. Moreover, the defendant also subsequently noted the very high level or readiness on the part of the plaintiff and his willingness to work above and beyond normal working hours for the business.

Conclusion: Despite the existence of common and recognized phrases often used by employers in references, a divergent formulation does not amount to an impermissible coded criticism. Much more decisive is how an objective reader understands or should understand the phrase and the context of the reference.

Rescission of Termination Agreements

Federal Labor Court, Judgment of November 10, 2011 – 6 AZR 357/10

A termination agreement is a mutual agreement, which the employee may rescind pursuant to Section 323 of the Civil Code in the event that the employer does not make the required severance payment despite a set deadline.

The Federal Labor Court decided a case in which an employee had entered into an agreement with his employer to terminate the employment relationship between them. In the agreement, the employer undertook to provide a severance payment. The payment was not made because the employer became insolvent. The employee therefore rescinded the contract and asserted the continuity of the employment relationship against the insolvency administrator. On November 10, 2011, the Federal Labor Court decided that a termination contract cannot be validly rescinded after the filing of an insolvency petition and a restriction on the disposition of assets under insolvency law is in place. (Case 6 AZR 357/10).

Rescission of Termination Agreements

This Federal Labor Court decision, however, provides an opportunity to address, beyond the insolvency law aspect, the issue of whether and with which consequences an employer can subsequently release himself from a termination agreement.

Requirements for Rescission

In the decision discussed above, the Federal Labor Court confirmed that a termination agreement is a mutual agreement pursuant to Section 323 of the Civil Code, where there is reciprocal performance in the form of the employee's agreement to end the employment relationship and obligation of the employer to pay the agreed severance. As a rule, therefore, a termination agreement may be rescinded. Outside the insolvency context, the employer may rescind a termination agreement pursuant to Section 323 of the Civil Code if the employer does not make the severance payment despite its being due and the granting of a reasonable extension by the employee.

Exclusion of Right of Rescission

However, the employee's right to rescission can be excluded. Whether an exclusion of the right to rescission can be implied in termination agreements remains open in the Federal Labor Court decision. Such implied exclusions have thus far been recognized only in termination agreements in court settlements. The interests in an extrajudicial termination agreement are different than in a court settlement, where the employer in particular has an interest in a swift and final resolution of the legal dispute. As a result, heightened requirements are to be set for exclusions of the right to rescission in the case of an extra-judicial termination agreement. The exclusion should be expressly agreed and is subject to the restrictions of the law on general terms and conditions where form contracts are used.

Legal Effects of Rescission

The Federal Labor Court likewise left open the issue of the legal effects of rescission by the employee. The issue is disputed in the case law and secondary sources. One view is that rescission by the employee results in a retroactive voiding of the termination contract and the employment relationship automatically continues (Düsseldorf Higher Labor Court of January 20, 2010, Case 12 Sa 962/09 preceding the Federal Labor Court decision). The other view is that rescission does not retroactively void the termination contract. Under this view, the employee has a right to reinstatement that arises at the earliest at the time rescission is made. From a doctrinal perspective, this view should be preferred. Still, there is no high court pronouncement on this issue as yet. In any case, according to both views, rescission results in the continuation of the employment relationship between the parties.

Conclusion: Outside the insolvency context, an employee may rescind a termination agreement when the employer fails to make a severance payment, and thus achieve a continuation of the employment relationship.

Loss of Vacation Time in Cases of Disability – New Jurisprudence

Baden-Württemberg Higher Labor Court, Judgment of December 21, 2011 – 10 Sa 19/11

As a result of the ECJ's Schultz-Hoff decision (Judgment of January 20, 2009 C-350/06), the Federal Labor Court, as part of its developing law in conformance with EU law, ruled in its decision of March 24, 2009 – 9 AZR 983/07 – that statutory entitlements to vacation are not extinguished when the employer becomes ill and is therefore unable to work as of the end of the vacation year and/or the carry-over period.

According to the ECJ's most recent ruling, dated November 22, 2011 – C-214/10 – and the result of the Hamm Higher Labor Court's reference for a preliminary ruling, the accumulation of vacation entitlement over multiple years is not prohibited by European law and a national law limiting the carry-over period to 15 months is not objectionable under EU law.

The Baden-Württemberg Higher Labor Court subsequently ruled that, in the case of continuing inability to work, vacation entitlements are extinguished no later than 15 months after the end of the vacation year and are not compensable upon a later termination of the employment relationship.

Conclusion: It remains to be seen whether the Federal Labor Court will follow this decision. The Baden-Württemberg Higher Labor Court has in any event granted both parties leave to appeal.

HEUKING KÜHN LÜER WOJTEK

Responsible Editors:

Joachim Littig
Veit Päßler
Bernd Weller

These and all other editions of the Newsletter can be found on the Internet at:
www.heuking.de/en/about-us/newsletter

Berlin
Unter den Linden 10
D-10117 Berlin
T +49 (0)30 88 00 97-0
F +49 (0)30 88 00 97-99

Brussels
Avenue Louise 326
B-1050 Brussels
T +32 (0)2 646 20-00
F +32 (0)2 646 20-40

Chemnitz
Weststrasse 16
D-09112 Chemnitz
T +49 (0)371 38 203-0
F +49 (0)371 38 203-100

Cologne
Magnusstrasse 13
D-50672 Cologne
T +49 (0)221 20 52-0
F +49 (0)221 20 52-1

Düsseldorf
Georg-Glock-Strasse 4
D-40474 Düsseldorf
T +49 (0)211 600 55-00
F +49 (0)211 600 55-050

Frankfurt
Grüneburgweg 102
D-60323 Frankfurt am Main
T +49 (0)69 975 61-0
F +49 (0)69 975 61-200

Hamburg
Neuer Wall 63
D-20354 Hamburg
T +49 (0)40 35 52 80-0
F +49 (0)40 35 52 80-80

Munich
Prinzregentenstrasse 48
D-80538 Munich
T +49 (0)89 540 31-0
F +49 (0)89 540 31-540

Zurich
Bahnhofstrasse 3
CH-8001 Zurich
T +41 (0)44 200 71-00
F +41 (0)44 200 71-01

LAWYERS AND TAX ADVISORS

Berlin Brussels Chemnitz Cologne Düsseldorf Frankfurt Hamburg Munich Zurich

www.heuking.de