HEUKING KÜHN LÜER WOJTEK

Newsletter
Employment Law

October 2014

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as from 1 January 2015

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Editorial

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Dear readers,

We take pleasure in sending you our new "Employment Law" Newsletter. To provide you with the accustomed overview of current employment-law developments, we have made a selection of practically relevant judgments that we now wish to present to you.

Following on from the 2014 Pension Package, the Federal Government has now implemented a further legislation project contained in the coalition agreement, namely the minimum hourly wage of 8.50 Euro that will apply throughout Germany as from 1 January 2015. We present an overview of the law and its effects in an article. The decision by the Federal Social Court stating that in-house lawyers are not exempt from compulsory insurance under the statutory old-age pension scheme will have far-reaching consequences. As the full text of the judgment is now available and as promised, we are now taking up this subject again, and concern ourselves in particular with the question of protection of confidence given an existing exemption. We also feature two articles on the subject of temporary work. In February of this year, the Federal Labour Court decided on the question of whether periods, spent by an employee as temporary employee in the hirer's company, are to be credited against any qualifying periods in a subsequent employment relationship between him/her and the hirer. On the other hand, the OLG (Higher Regional Court) Hamburg was called on to concern itself with the question of whether account must be taken of temporary employees when calculating threshold levels, of relevance under co-determination law, related to the composition of the Supervisory Board.

Finally, we wish to draw your attention to our annual series of seminars on current aspects of employment law; these will be held at all offices of Heuking Kühn Lüer Wojtek and we look forward to seeing you there. The themes of this year's talks are:

"Fixed-term employment relationships", "Current aspects of the organisation of working hours", "Severely disabled people in working life" and "Employee data – access, use and protection".

We wish you enjoyable reading.

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Articles
Employment Law

The Practice Group Employment Law is made up of a team of lawyers specialising in employment law and qualified specialist lawyers for employment law. We advise and represent national and international companies in all areas of employment law. Our articles cover important new decisions, changes to the law and current case law in the field of employment law.

Statutory minimum wage of 8.50 Euro as from 1 January 2015

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The Law to Strengthen Free Collective Bargaining will result in the introduction of a national minimum wage of 8.50 Euro per clock hour in Germany with effect from 1 January 2015. Even employers who already pay above the minimum wage must prepare for far-reaching changes.

The Minimum Wage Act (MiLoG) gives rise to a number of complex questions, illustration of which would go beyond the limits of this Newsletter. This article is therefore limited to a cursory illustration of a few selected problem areas.

All employees – including those in insignificant employment – are covered by the MiLoG. Practical trainees are also employees within the meaning of the law (Section 22 MiLoG). The exceptions, formulated in Section 22 Subsection 1 MiLoG for this group of people, throw up questions that are not answered by the law and which create significant legal uncertainty. For example, an internship of up to three months for the purpose of gaining orientation for vocational training or for studying, need not be remunerated by the minimum wage. In the event of exceeding of the three-month period, is the minimum wage payable from day 1 or only as from month 4?

Due date

Under Section 2 MiLoG, the minimum wage is payable on the agreed due date, at the latest however on the last banking day (Frankfurt am Main) of the month following the month in which the work performance was provided, see Section 2 MiLoG.

Crediting of allowances etc.

This therefore gives rise to the question – also unanswered by the law – as to which remuneration components can be credited against the minimum wage of 8.50 Euro per clock hour. If one transfers previous case law related to the Law on the Posting of

Workers (AEntG), payments are only taken into account if they do not alter the ratio of performance and counter-performance, if they serve as remuneration for the "normal performance". Accordingly, annual special payments are only credited against the minimum wage in so far as they are paid monthly and irrevocably.

Beware of concealed circumvention when formulating contracts

Caution is called for when formulating contracts. For example, the agreement of a fixed monthly remuneration or of unpaid overtime can result in concealed circumvention of the envisaged minimum hourly wage. Section 2 Subsection 2 MiLoG could offer a solution to this problem, as it contains an escape clause in favour of working-time accounts.

Obligations to document

MiLoG will create increased documentation obligations for employers. For example, the start, end and duration of daily work must be recorded for each insignificant employee – irrespective of the sector in which he/she works – up until the end of the seventh calendar day following the date of the work performance, Section 17 Subsection 1 MiLoG. These records must be kept for at least two years from the authoritative date for the recording. The above rulings also apply to the industrial sectors and branches of the economy stated in Section 2a of the Law Combating Illicit Work (for example freight forwarding, transport, logistics, industrial cleaning, the building sector, passenger transport) and to hirers using temporary employees in one of the above sectors.

Liability under 13 MiLoG

One ruling that has thus far been neglected to a large extent in practice is Section 13 MiLoG. Under this ruling, an entrepreneur who appoints another entrepreneur to provide work or services is liable for the obligation of this entrepreneur, the subcontractors and hirers involved to pay the minimum wage to the respective employees. If, therefore, employees in the order chain are not paid the minimum wage, they can choose one principal within the order chain and demand the minimum wage from this principal. The party claimed against must pay and cannot be exculpated from this liability.

Section 13 MiLoG as liability of the principal or general-contractor liability

An outstanding question is whether Section 13 MiLoG constitutes liability of the principal or exclusively general-contractor liability based on the case law of the Federal Labour Court (BAG) concerning Section 1a AEntG. In the latter case, only the party in turn using subcontractors for the performance of its obligations would be liable.

Non-obligatory status, waiving, forfeiting

The entitlement to the minimum wage is mandatory. Consequently, preclusive periods under employment contracts or collective wage agreements are not applicable in respect of this entitlement. Waiving is only possible for entitlements already created, and even then only on the basis of a judicial settlement. Forfeiture is excluded.

Administrative offence and administration fine

Even unintentional violations of the MiLoG involve significant liability risks. Because, if the employer does not pay the minimum wage or does not do so on time, he is acting illegally under Section 21 MiLoG. This is liable to punishment by an administration fine of up to 500,000 Euro. The same applies to employers who have work or services provided by another entrepreneur in a significant scope, if the latter or a subcontractor does not pay the minimum wage or does not do so on time, and the principal was aware of this or should have been aware of it. Failure to document or incorrect documentation is likewise punishable by administration fine.

Effects on competitive tendering procedures

The imposition of an administration fine of at least 2,500.00 Euro has far-reaching consequences since, under Section 19 MiLoG, companies concerned are to be excluded from awards of public contracts for an appropriate period until such time as their reliability has been restored.

Criminal liability and (potential) personal liability

Last but not least, account must be taken of the potential criminal liability as a result of the withholding and misappropriation of work remuneration (Section 266a StGB (German Criminal Code)). As the level of the social charges to be paid is based on the minimum wage owed and not on the lower remuneration actually paid, failure to pay the minimum wage is also likely to involve non-payment of social charges – and potential personal liability of the party responsible.

Summary: Employers should check in sufficient time prior to the coming into effect of the MiLoG whether payment of the minimum wage is ensured in all contract constellations, or whether there is a need for adjustment in terms of employment contracts or payment modalities. Contracts of employment and contracts for work and services should be supplemented in order to minimise the risk of liability under Section 13 MiLoG, for example through the inclusion of indemnification agreements.

In-house lawyers – numerous questions still remain

BSG, 3.4.2014, B 5 RE 3/14 R and others

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At the end of August 2014, the Federal Social Court (BSG) presented the long-awaited reasons for its three judgments dated 3 April 2014 concerning exemption from compulsory statutory old-age pension insurance for in-house lawyers. In many cases, the clarity hoped for has not materialised.

In three fundamental judgments dated 3 April 2014, the BSG established that in-house lawyers work for their employers on a dependent basis, and are therefore subject to compulsory insurance in all branches of the social insurance system. In particular, there can be no exemption from the statutory old-age pension scheme for work as an in-house lawyer in favour of membership of the professional pension scheme for lawyers (see July 2014 Newsletter). An in-house lawyer is a lawyer, not because he is an in-house lawyer, but because he acts as a lawyer separately, independently of and parallel to this on the basis of an admission to practice, to be issued solely for this purpose. Both functions must be seen separately from one another as a fundamental rule (so-called "Double-profession theory").

It had been hoped that the eagerly awaited reasons for the judgments would provide clarification, in particular concerning the scope of the legal validity of the exemption notifications issued to in-house lawyers, and on the scope of the protection of confidence called for. Nevertheless, important questions remain unanswered. Only the following two cases are clear.

No exemption notification to date

Applications for exemption from compulsory insurance under the statutory old-age pension scheme for work as in-house lawyers that were still outstanding as at 3 April 2014 or applications received after this date will be rejected by the Deutsche Rentenversicherung Bund (DRV Bund) with brief standard formulations, with reference to established constitutional-law and professional-law case law concerning the occupational profile of lawyers under the Federal Lawyers' Code (BRAO) and without checking on a case-by-case basis. Legal advisors who are in a fixed service or employment relationship with a specific employer (in-house lawyer), will not work as a lawyer in this capacity. The BSG explicitly rejects protection of confidence for the "unlawful administrative practice in deviation from the law" of the DRV Bund with its 4-criteria theory ("legal advising, legal brokering, legal decisions, legal constitutive work").

Exemption notification is available – the same work?

By contrast, holders of a favourable exemption decision can – according to the BSG – trust in the continued legal validity of this, as long as they continue in the same employment for which they have received the exemption. Authoritative therefore is the wording of the respective exemption notification. Because, over the years, the DRV Bund (or its predecessor institution Bundesversicherungsanstalt für Angestellte – BfA) has chosen very differing formulations in the exemption notifications. Exemption was in part (only) person-related, in part job-related, but without limitation to a specific employer. It is only since roughly 2006 that exemptions have been issued for a specific employer and a specific job. Differences can therefore result on a case-by-case basis depending on the "exemption-notification generation".

Other circumstances that could create protection of confidence

In addition, a number of further case scenarios are conceivable which can create individual protection of confidence in another way. For example, persons who have received written (or telephone) information from DRV Bund when changing employer, stating that there is no need for renewed application, should enjoy protection of confidence.

Need for action on the part of companies?

The employer has an entitlement to information from the in-house lawyer concerning whether an exemption notification has been received, and if so to submission thereof. The employer must include this with the remuneration documents (Section 8 Subsection 2 No. 1 Rules of Procedure for Contributions – BVV) and submit it to the auditing services of the DRV on request during a government tax audit. If it is possible to submit an exemption notification, this must be checked in terms of its scope. If it is not possible to submit an exemption notification, the employer must register the in-house lawyer with DRV Bund and pay the old-age pension insurance contributions to the latter. Otherwise, the employer could render himself liable to criminal punishment based on the withholding of social insurance contributions (Section 266a StGB).

Summary: The decision on whether in-house lawyers can be exempt from compulsory insurance under the statutory old-age pension scheme in future, is the reserve of the legislator. This would require an amendment to the Federal Lawyers' Code (BRAO). In-house lawyers who are not in possession of an exemption notification must be registered with the DRV Bund immediately. If an exemption notification has been received, this must be checked in terms of whether it still covers the current activity, or whether protection of confidence could apply in the specific individual case in certain circumstances.

Extraordinary termination based on strong suspicion

BAG, judgment dated 20.3.2014, 2 AZR 1037/12

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Extraordinary termination based on strong suspicion is also possible without prior hearing of the employee in exceptional circumstances.

The suspicion of contract-violating conduct can destroy the trust in an employee that is required for continuation of the employment relationship. If the employer wishes to use this as the basis for termination, he has a fundamental obligation to hear the employee concerning the accusations against him/her before serving notice of termination. This can result in significant time delays. These delays can mean that extraordinary termination without notice is no longer possible due to the time lapse, and that the only remaining possibility is ordinary termination. In its decision worth reading dated 20 March 2014, the Federal Labour Court (BAG) concerned itself with various questions related to this subject area.

The starting point for the considerations of the BAG is Section 626 Subsection 2 Sentence 1 BGB (German Civil Code). This states that extraordinary termination is only possible within two weeks. Under Subsection 2 Sentence 2, the period begins on the date on which the party entitled to terminate gains knowledge of the authoritative facts for the termination. This is the case as soon as he has reliable and as complete knowledge as possible concerning the relevant facts, which enables him to decide whether he should continue the employment relationship or not. If only indications are available initially, the party entitled to terminate can carry out further investigations at his free discretion after due assessment of the circumstances, and can also hear the person concerned, without triggering the period as per Section 626 Subsection 2 BGB.

If the employer opts for a hearing – this is optional in the case of termination for gross misconduct – this must take place within a short deadline which must not normally exceed one week. The BAG has now decided that exceeding of this deadline is admissible in exceptional circumstances, if the employee is unable to attend an initial hearing date set – for example as a result of a rehabilitation measure – and therefore requests a written hearing, which the employer grants, and the hearing procedure lasts a total of ten days as a result.

Deadline for a hearing, maximum one week as a rule

Hearing can only be dispensed with in exceptional circumstances

In the event of termination based on strong suspicion, the hearing is obligatory and can only be waived in exceptional circumstances. To date, this was by all means supposed to apply if the employee declares that he/she will not comment on the accusation made against him/her and does not state any relevant reason for this.

The BAG has now supplemented its case law to include the scenario of the employer setting an appropriate deadline for comment, but which the employee allows to pass – possibly even involuntarily, for example due to illness. The employer can then proceed directly with termination even without a hearing and thus stop this "playing for time". Alternatively, the employer can wait for the employee to recover and then conduct the hearing. The BAG is of the opinion that, in such cases, sufficient special circumstances will normally apply which delay the start of the period as per Section 626 Subsection 2 BGB for a correspondingly long length of time.

Summary: The situation remains that, before termination based on strong suspicion, the employer must hear the employee concerning the accusations made against him/her. Only in exceptional cases does the obligation to hear not apply. A regular possibility will be to base dismissal on both "proven" violation of obligations (termination for gross misconduct) as well as on the "strong suspicion" of corresponding misconduct. Nevertheless, the Works Council (if one exists) must then be involved in both aspects. In the event of extraordinary termination based on strong suspicion, the hearing must take place within a period of one week as a rule. Only in exceptional circumstances can this period be exceeded. The employer should also serve notice of ordinary termination as a precautionary measure.

Dismissal with the option of altered conditions of employment qualifies as notifiable "termination of employment"

BAG, judgment dated 20.2.2014, 2 AZR 346/12

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Dismissals with the option of altered conditions of employment must be taken into account when determining the number of "terminations" for the purpose of ascertaining the threshold levels as per Section 17 Protection Against Dismissal Act (KSchG). This applies irrespective of whether the employee dismissed rejects the offer or accepts it – even under reserve.

An employee took legal action against the effectiveness of his final dismissal for operational reasons. The reason for the dismissal was restructuring of a company which did not regularly have more than 170 employees. Aside from the Claimant, a further 17 employees had simultaneously received notice of termination within the context of the personnel measures, two of which were "only" dismissals with the option of altered conditions of employment. The employer had not issued notification of a mass dismissal beforehand. In contrast to the LAG Munich in the preceding 2nd instance, the Federal Labour Court (BAG) allowed the legal action for unfair dismissal. The termination was ineffective, among other reasons due to the failure to issue notification of a mass dismissal, required as per Section 134 BGB (violation of a statutory prohibition).

Authoritative threshold levels for mass dismissals

Based on the authoritative company size (170 employees), the decisive aspect of the question of whether the authoritative threshold level as per Section 17 Subsection 1 KSchG (in this case: 10 percent of the persons employed) had been exceeded, was whether the dismissals with the option of altered conditions of employment were to be counted or not. During the proceedings, the Defendant employer had essentially explained the non-notification of the dismissals by claiming that the two employees, who had been dismissed with the option of altered conditions of employment, had accepted this – albeit under reserve of checking of the social justification as per Section 2 Subsection 1 KSchG. As these were therefore employed further and did not leave the company, there could be no talk of the "termination" of their employment.

Ending element of dismissal with the option of altered conditions of employment is decisive

The BAG did not accept this argumentation. Dismissal with the option of altered conditions of employment always comprises two declarations of intent, namely the notice of termination aimed at ending the employment relationship, and a parallel offer of continued employment. Given the obligatory ending

element, any dismissal with the option of altered conditions of employment constitutes "genuine" termination. Whether or not this dismissal ultimately actually results in the employee's departure from the company is not decisive – neither on the basis of the wording of Section 17 KSchG, nor under the provisions of the European Directive on Mass Dismissals. The regulation is linked solely to the intention of the employer to dismiss a specific number of employees. Dismissal with the option of altered conditions of employment includes this intention, because the employer must by all means reckon with the employee not accepting the offer of altered conditions (not even under reserve), with the result that final dismissal takes effect. Additionally, the obligation to consult the Works Council prior to a mass dismissal, as provided for in Section 17 Subsection 2 Subsection 3 KSchG, is equally sensible in order to prevent possible departure of an employee as a result of dismissal with the option of altered conditions of employment. If the aim of the contract amendment is to reduce the weekly working hours, continuation of the contractual relationship could also even have negative consequences for the local labour market, as the employees would have to look for a secondary occupation.

Consultation with the Works Council is also advisable concerning intended contract amendments

Unanswered question remains

The BAG has not answered one question that was not relevant in the case decided, as the Claimant employee had received notice of "purely" final termination. The court left undecided the extent to which the employee affected by dismissal with the option of altered conditions of employment can invoke the failure to notify a mass dismissal, if he/she accepts the altered conditions of employment offered under reserve of confirmation of the social justification of the alterations. As general opinion is that the scope of the check within the context of the procedure under Section 2 KSchG is not limited, the conclusion of assuming the ineffectiveness of the dismissal with the option of altered conditions of employment then also appears natural.

Summary: As the absence of the necessary notification of mass dismissal can result in the ineffectiveness of all dismissals affected by this, utmost care is called for when calculating the threshold levels. In case of doubt, notification should be made as a precautionary measure. It should also be noted that, even if notification has been made, errors in the procedure as per Sections 17 et seq. KSchG usually result in the ineffectiveness of the dismissals in question. As a number of dismissals are always affected by this, caution is also called for in this respect.

Work as temporary employee is not creditable against qualifying period

BAG, judgment dated 20.2.2014, 2 AZR 859/11

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Employment as temporary worker in the hirer's company is not credited against the subsequent qualifying period under Section 1 Subsection 1 KSchG. Under the Protection Against Dismissal Act (KSchG), the respective rule scope decides whether temporary employees are classified as employees of the hirer.

Within the context of legal action for unfair dismissal, the Federal Labour Court (BAG) was required to decide on the applicability of the Protection Against Dismissal Act.

The Claimant worked in a drug store outlet of the Schlecker Group over a period of years. When this drug store was closed, the Claimant reached an agreement with her previous employer on cancellation of the existing employment relationship, and concluded a contract of employment with a temporary employment agency. This agency hired the Claimant out to the Defendant who was also a member of the Schlecker Group. Ultimately, the Claimant cancelled her employment relationship with the temporary employment agency and entered into an employment relationship with the Defendant.

Less than 6 months later, the Defendant served notice of ordinary termination of the employment relationship with the Claimant. The Claimant considers that the dismissal is not socially justified. The Protection Against Dismissal Act is applicable. Among other things, she claimed that the time spent as temporary worker in the Defendant's company must be credited against the qualifying period under Section 1 Subsection 1 KSchG.

The BAG referred the matter back to the State Labour Court for further hearing and a decision. The BAG was unable to establish conclusively whether the KSchG is applicable. However, application of the KSchG could not be derived from the Claimant's previous work as temporary employee.

In the opinion of the BAG, periods during which the employee was incorporated into the hirer's company as temporary worker, cannot, fundamentally speaking, be taken into account when calculating the qualifying period as per Section 1 Subsection 1 KSchG in a subsequent employment relationship between the employee and the hirer. This also applies in the event of a

Fundamentally speaking, no crediting of work as temporary employee against the qualifying period under Section 1 Subsection 1 KSchG

seamless transition from temporary hiring out to the employment relationship.

The BAG initially invokes the wording of Section 1 Subsection 1 KSchG. This is based on the uninterrupted existence of the employment relationship in the company or enterprise concerned, but not on the actual duties.

In addition, the non-crediting is also consistent with the sense and purpose of the qualifying period. This enables mutual trying out. However, a trial of this nature is not fully possible during temporary hiring out. For example, the employer cannot judge whether the employee complies with his accessory obligations in terms of wage payment and the granting of holiday. As such, there is no relationship between the parties during temporary hiring out.

No conflict with the classification of temporary employees in Section 23 KSchG

In the opinion of the BAG, this decision likewise does not conflict with the fact that temporary workers are taken into account when calculating the size of a company in the context of Section 23 Subsection 1 KSchG, if they cover a personnel requirement that is normally given. The purpose of Section 23 KSchG is only to exempt companies from the application of the KSchG if they have the typical characteristics of a small company. In this respect, it is immaterial whether the duties are performed by own or outside employees.

Referral of the matter back to the LAG

The BAG has referred the matter back to the State Labour Court for further hearing and a decision. The applicability of the KSchG can result from an individual agreement between the parties. Thus far, however, no findings have been made concerning such agreements.

Summary: Employers can continue to rely on having a six-month trial period for new employees. The date on which the employment relationship is established is decisive. The actual use of temporary employees in the company will not be credited against the qualifying period under Section 1 Subsection 1 KSchG, even if the same workplace is involved and the employment relationship follows on directly from the temporary hiring out. As far as possible, contracts of employment should avoid anything that could give rise to the impression on the part of the employee that his/her employment relationship will continue unaltered despite a change of official employer (for example waiving of the probationary period).

Compensation for lapsed holiday entitlement – even without application for holiday

LAG Berlin-Brandenburg, judgment dated 12.6.2014, 21 Sa 221/14

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Contrary to the previous case law of the Federal Labour Court (BAG), the State Labour Court (LAG) Berlin-Brandenburg has decided that employers are obliged to fulfil the holiday entitlement as per the Federal Holiday Act as well as the entitlement to breaks and rest periods under the Law on Working Hours, of their own accord. This applies irrespective of whether the employee has submitted a holiday application beforehand or not.

The Claimant had been employed by the Defendant since November 2010. Following the end of the employment relationship, the Claimant claimed compensation for his 2012 holiday among other things. The Defendant countered this claim by arguing that the Claimant had not – and this is true – submitted a corresponding holiday application, either during the current calendar year 2012 or by 31 March 2013, i.e. by the end of the carry-forward period. As a result, the Defendant was not responsible for the lapsing of the holiday entitlement.

Obligation to provide damages even without a prior holiday application by the employee

The LAG Berlin-Brandenburg considering the appeal allowed the legal action and ordered the Defendant to provide compensation for the holiday. In the opinion of the court, the Defendant employer had culpably violated his obligation to grant the Claimant holiday in time. The result was that the holiday entitlement had lapsed due to the passing of time, and the Defendant was obliged to pay the Claimant damages. Fulfilment of the holiday entitlement is rendered impossible through its lapsing. In such cases, the employee can demand substitute holiday or – if the employment relationship has ended – compensation for the holiday entitlement not taken. The fact that the Claimant had not submitted a holiday application, neither in the calendar year 2012 nor by the end of the carry-forward period, and thus put the Defendant in default, is immaterial. Responsibility for compliance with the statutory requirements under the Federal Holiday Act (BUrlG) lies solely with the employer.

Employer must grant holiday in sufficient time of its own accord and without a prior request.

The LAG Berlin-Brandenburg initially bases the view that the employer is obliged to grant an employee holiday in sufficient time even without a prior request on the wording of Section 7 Subsection 3 BUrlG. The formulation stating that holiday must be "granted and taken" within the period stated therein, indi-

cates that the employer is obliged to fulfil the entitlement of his employees to the statutory minimum holiday of his own accord and not only following a corresponding request. Additionally, the statutory holiday entitlement is aimed at protecting health and has an occupational health and safety character. Occupational health and safety law recognises that the employer is also required to fulfil his health-protection obligations without prior request. Finally, the LAG also justifies its judgment by stating that the employer must fulfil the entitlements of his employees under the Federal Holiday Act as well as the entitlement to breaks and rest periods under the Law on Working Hours, of his own accord. According to the LAG, the holiday entitlement is a form of "annual rest period" which differs hardly at all from the daily and weekly rest periods to be observed.

Inconsistency with previous case law of the BAG

The judgment of the LAG Berlin-Brandenburg deviates from the case law of the Federal Labour Court. According to the latter, an entitlement to damages in the form of substitute holiday, which is converted into a claim for compensation upon ending of the employment relationship only exists if the employer was in default on granting the original holiday entitlement at the time of its lapsing (BAG judgment dated 15.9.2011, 8 AZR 846/09). As the LAG Berlin-Brandenburg does not presuppose this, the State Labour Court allowed a further appeal to the Federal Labour Court.

Summary: Contrary to the case law of the Federal Labour Court, the State Labour Court Berlin-Brandenburg has decided that the employer must fulfil the holiday entitlements of his employees under the Federal Holiday Act of his own accord. If an employer culpably fails to comply with this obligation and the holiday entitlement lapses as a result, the employer runs the risk of claims for damages. The LAG Berlin-Brandenburg has thus ruled that the employer is solely responsible for ensuring that employees take their holiday in the envisaged period. At least until such time as the Federal Labour Court issues a clarifying appeal ruling, employers should therefore monitor the actual taking of the statutory minimum holiday by individual employees, so as to prevent excessive "accumulation" of holiday and possible damage claims.

No special protection against dismissal for candidates for the electoral committee

BAG, 31.7.2014, 2 AZR 505/13,
Press Release no. 38/14

The Federal Labour Court (BAG) has decided that candidates for a position on the electoral committee do not enjoy special protection against dismissal until such time as they have been effectively and successfully elected, not however as unsuccessful candidates.

The Second Senate of the BAG was called on to decide on the previously disputed question of whether employees who unsuccessfully stand as candidates for a position on the electoral committee within the context of Works Council elections, enjoy special protection against dismissal under Sections 15 Subsection 3 KSchG (Protection Against Dismissal Act) and Section 103 BetrVG (Works Council Constitution Act). Through its judgment, the BAG has agreed with the opinion represented by the LAG Baden-Württemberg. According to this, only employees who have been effectively elected or appointed as members of the electoral committee are entitled to the special protection against dismissal. By contrast, no special protection against dismissal is created in the event of ineffective or unsuccessful elections/appointment procedures.

The BAG was also required to decide whether critical comments by an employee in an Internet/YouTube video constitute an important cause within the meaning of Section 626 BGB. While the Labour Court Rheine and the LAG Hamm denied employees the right to make demonstrably untruthful factual claims via Internet video, the BAG assessed the matter differently. In the video, the employee had untruthfully claimed "that no expert personnel is available". The BAG regarded this as an admissible explanation of why the employee considered it necessary to elect a Works Council for the first time. The BAG did not see any reason for dismissal in the fact that – following a failed Works Council election – the employee was stirring up hostile feelings via the Internet.

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YouTube criticism admissible

Summary: Participants in Works Council elections are not entitled to special protection against dismissal until such time as they have become effectively appointed or elected members of the electoral committee or candidates for membership of the Works Council. Unjustified criticism of the employer, including via the Internet, does not necessarily constitute grounds for dismissal.

Fixed-term contract of employment with Works Council without factual reason

BAG, judgment dated 25.6.2014, 2 AZR 505/13
Press Release No.28/14

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Employment contracts of members of the Works Council can also be for a fixed term, without factual reason and without an entitlement to extension of the contract.

The parties in a legal dispute argued about the effectiveness of an agreement on a fixed term. The Claimant employee, who was simultaneously a member of the Works Council, was employed by the Defendant employer on a fixed-term basis without a factual reason. Shortly before the expiry of the fixed-term employment relationship, the employer informed her that the contract would not be extended. The employee filed legal action for annulment of the fixed term clause and requested continued employment on an indefinite basis. She claimed recourse to the fact that the company regularly extended fixed-term contracts of employment or annulled the fixed term clause. The only reason why this had not happened in her case was because she was a member of the Works Council.

Fixed term without factual reason as per Section 14 Subsection 2 TzBfG

The Federal Labour Court agreed with the previous instances and dismissed the legal action. Under the Law on Part-Time and Fixed-Term Employment (TzBfG), contracts of employment for new employees can be limited for a maximum period of two years without the need for a factual reason (Section 14 Subsection 2 TzBfG). Within this maximum period and given a shorter time limitation, the calendar-limited contract of employment can also be extended a maximum of three times. As confirmed by the Second Senate in its judgment, this also applies to fixed-term employment contracts with members of the Works Council.

Holding office as a member of the Works Council does not stand in the way of employment for a fixed term

Holding of office as a member of the Works Council does not stand in the way of employment for a fixed term. The special protection against dismissal, provided for in Section 15 KSchG and according to which members of the Works Council can only be dismissed without notice in exceptional circumstances and given the presence of an important cause, is likewise not circumvented by the conclusion of a contract of employment that is for a fixed term only.

Disadvantaging as a result of involvement on the Works Council inadmissible

The decision to extend a fixed-term employment relationship or to take over a fixed-term employee into an indefinite employment relationship is the sole responsibility of the employer. If the employer refuses to continue the employment relationship, this is only inadmissible if the reason for not offering the employee

a follow-on contract is precisely because of his/her involvement on the Works Council. Because this would constitute inadmissible disadvantaging of the employee on the basis of his/her position of office.

In litigation, the burden of proof for the claimed disadvantaging lies with the employee. In this respect, however, it is sufficient if the member of the Works Council can present evidence indicating disadvantaging as a result of involvement on the Works Council. The employer must address this matter specifically and invalidate the evidence. If the member of the Works Council succeeds in proving the claimed disadvantaging, he/she has a judicially enforceable claim to conclusion of an indefinite contract of employment.

Burden of proof lies with the employee

Summary: Employers are not obliged to extend fixed-term employment contracts – not based on factual reasons – with members of the Works Council, or to convert them into indefinite employment relationships due to their position of office. A member of the Works Council can only invoke annulment of the fixed-term clause if he/she can provide evidence indicating disadvantaging due to the involvement on the Works Council, and the employer is unable to invalidate this evidence.

Temporary employees cannot be counted towards the threshold level for co-determination

OLG Hamburg, ruling dated 31.1.2014 – 11 W 89/13

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The regular use of temporary employees remains part of the organisational concept in many companies. As such, the question frequently arises as to the extent to which temporary employees must be taken into account when calculating threshold levels under employment law. The Higher Regional Court Hamburg has now rejected inclusion of temporary employees when calculating the authoritative co-determination threshold level under Section 1 MitbestG (Co-determination Act).

The background to the proceedings was a permanent reduction in the number of employees to below 2,000 in the eyes of the company. Consequently, the equal representation on the Supervisory Board, previously required under the Co-Determination Act (MitbestG), was no longer lawful. Only the Law on One-Third Participation (DrittelbG) was now applicable. In the status proceedings, the objection was raised that the threshold level of 2,000 employees was still exceeded if account was taken of temporary staff.

The OLG (Higher Regional Court) Hamburg rejected consideration of temporary employees when calculating the threshold levels for co-determination in the company. While the Federal Labour Court (BAG) has since abandoned its original principle that "temporary employees are entitled to vote but do not count" and has repeatedly taken them into account when determining the threshold levels, the OLG has stood by earlier case law. Like the OLG Düsseldorf in 2004, it is still of the opinion that equal treatment of temporary employees and the core staff in co-determination of the company is neither intended nor necessary. It is the duty of the Supervisory Board to act on a medium and long-term basis and to control the decisions of the company. This has only a marginal impact on the interests of the workers used merely on a temporary basis, who have the alternative of returning to the hirer company.

Appeal on a point of law to the Federal Supreme Court allowed

Given the fundamental significance of this decision, concerning which there has thus far been no decision by the Supreme Court, the OLG Hamburg has allowed the appeal on a point of law, with the result that a decision of the Federal Supreme Court (BGH) (II ZB 7/14) on this matter can be expected soon.

BAG will also decide

A case is also before the BAG (7 ABR 42/13) concerning the consideration of temporary workers under the MistbestG. This concerns the question of whether the election of the employee representatives under Section 9 Subsection 1 MitbestG is to be conducted as an election of delegates, because, as a rule, there are more than 8,000 employees including the temporary staff. In contrast to the OLG Hamburg, the LAG Hesse (ruling dated 11.4.2013 - 9 TaBV 308/12) has decided that temporary employees must be taken into account when calculating the number of employees in accordance with Section 9 Subsections 1 and 2 MitbestG.

Government (still) inactive

Further clarity could (even) be provided soon by the government. The coalition agreement sets out clearly that, in order to facilitate the work of Works Councils, the law will provide clarification that temporary employees must, as a fundamental rule, be taken into account when determining the threshold values under the Works Council Constitution Act, provided this does not contradict the directional aim of the respective standard. Thus far, however, there are no known legislative activities in this respect.

Counting under BetrVG and KSchG

The U-turn by the BAG as regards the counting of temporary employees was initially for the area of works council constitution law. According to Section 7 Sentence 2 BetrVG, temporary employees eligible to vote must be taken into account when determining the authoritative threshold level for changes in operations as per Section 111 Sentence 1 BetrVG (BAG, judgment dated 18.10.2011 - 1 AZR 335/10). As a fundamental rule, temporary employees must also be counted when determining the size of the Works Council as per Section 9 Sentence 1 BetrVG (BAG, judgment dated 13.3.2013 - 7 ABR 69/11). Additionally, the BAG has already extended the inclusion of temporary employees to the determination of the size of the company under Section 23 Subsection 1 Sentence 3 KSchG (judgment dated 24.1.2013 – 2 AZR 140/12).

Summary: It remains to be seen what positions the BGH and the BAG adopt concerning consideration of temporary employees as regards the threshold levels for co-determination in companies. Overall and in view of the high number of employment-law threshold levels, a check must be carried out in each individual case in terms of whether established case law already exists or whether individual legal thinking from previous decisions can be taken over.

Practical examples
Employment Law

Heuking Kühn Lüer Wojtek uses regular events as well as lectures and publications by our lawyers from the Practice Group Employment Law to provide information on employment-law subjects of everyday relevance to clients. The following pages also provide an overview of the latest personal data and distinctions of our Practice Group Employment Law.

Publications

The question of the extent to which an employer can have his employees managed by third parties who are not in a service or employment relationship with him, is dealt with by **Dr Wilhelm Moll, LL.M**. in his article "Management of personnel by third parties" in the recent commemorative publication for **Prof Dr Rolf Wank**.

Dr Sascha Schewiola has published a comment on the subject "Professional football – premature ending of a fixed-term contract through one-off payment" in Issue 3 of the "Arbeits-Rechts-Berater".

Prof Dr Martin Reufels has published an article on "Characteristics of working capital in the transfer of company ownership" in Magazine 8 of the "Arbeits-Rechts-Berater".

In Magazine 9 of the "Arbeits-Recht-Berater", **Dr Sascha Schewiola** concerns himself with two recent judgments of the Federal Labour Court dated 20 February 2014 and 25 May 2014 on transfer of company ownership.

Dr Johan-Michel Menke, LL.M. published a comment on the subject "Professional football – unilateral extension options for the club in player contracts are admissible" (BAG, 25.4.13 - 8 AZR 453/12) in the "Betriebsberater".

The article "What to know about international football player transfers to Germany" by **Dr Johan-Michel Menke, LL.M.** appeared in "The International Sports Law Journal".

Lectures

Within the framework of events organised by the Beck Academy, **Bernd Weller** will speak on the subjects "Works Council Constitution Law for Beginners" in Cologne on 19 November, and "Works Council Constitution Law for Experts – Decision Update" on 20 November 2014, likewise in Cologne.

On 18 and 19 November 2014, **Regina Glaser LL.M.** will address the Euroforum Conference "HR meets Law" in Munich on the subject "Social Media/Data Protection in Employment Relationships". As an expert in the field, she will report on the subject "Experience of Crisis Situations from an HR Perspective" on 18 November, and on the subject "Potential of the Generation Y – how can it be put to optimum use?" on 19 November.

On 5 November 2014, **Dr Holger Lüders** will be holding the seminar "Optimum Formulation of Employment Contracts" for the Beck Academy in Düsseldorf. The seminar will also be organised in Frankfurt, Munich and Berlin in 2015.

Events

Series of seminars on Employment Law

This year, the Practice Group Employment Law will again be organising seminars on employment-law themes at all German locations. Each lecture event will last approximately 2 hours. They will be followed by a get-together with the possibility of addressing further questions to our speakers.

The following subjects will be dealt with in November 2014:

- Fixed-term employment relationships
- Severely disabled people in working life
- Current aspects of the organisation of working hours
- Employee data – access, use and protection

Please address any questions you may have to Ms Ann Carolin Endres on 0211 600 55-173 or by email to a.endres@heuking.de.

Further, regularly updated, information on our seminars can be found at www.heuking.de/veranstaltungen or on your smartphone or tablet using the following QR code:

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