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Newsletter
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Dear readers,

we welcome your interest in our new "Employment Law" Newsletter.

As usual, the Newsletter provides you with an overview of recent developments in employment law, and of important decisions with practical relevance.

The planned administrative practice of the Deutsche Rentenversicherung Bund (German Federal Pension Fund) for so-called "old cases" involving in-house lawyers was eagerly awaited. The first article is devoted to this subject that is of deep interest to company lawyers. It is followed by a summary of the changes to the German Parental Allowance, Parental Leave and Family Nursing Care Act that took effect on 1 January.

The State Labour Court Baden-Württemberg has concerned itself with the question of what protection "precautionary" licenses for the hiring out of temporary employees (still) have when using outside personnel and, in so doing, has created additional uncertainty.

We also wish to draw particular attention to judgments of the Federal Labour Court (BAG) concerning the effectiveness of termination to the next admissible date as an alternative measure, on frequent short illness as an important reason for termination without notice, and on the appraisal of performance in employment references. The BAG was also called on to decide whether minimum remuneration is also owed for emergency stand-by duty in nursing care.

In conclusion, some information concerning our own organisation: 1 January 2015 saw the opening of our new office in Stuttgart. We are pleased that we can now offer you our employment-law expertise in all economically important regions of Germany.

We wish you exciting and interesting 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.

In-house lawyers – new developments

DRV publication dated 12.12.2014 as well as benchmark paper of BMJV dated 13.1.2015

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Following the decisions of the Federal Social Court (BSG) on 3 April 2014, the Deutsche Rentenversicherung Bund (DRV) commented on its planned administrative practice on 12 December 2014. On 13 January 2015, the Federal Ministry of Justice and Consumer Protection (BMJV) also published a benchmark paper on the planned new legislation. This sets out a legally secure path for employers in terms of dealing with so-called old cases.

Following the decisions of the Federal Social Court on 3 April 2014 (see our October 2014 Newsletter, page 7 et seq.), the DRV also commented on the planned handling of so-called old cases on 12 December 2014. Fundamentally speaking, the DRV has opted for a "future-oriented solution". As a result, the DRV will not request back payment of past pension insurance contributions for in-house lawyers who

- have a current exemption notification for their present employment,
- have already reached the age of 58 as at 31 December 2014 (unless they are not performing any legal advising role for their current employer),
- are re-registered with the statutory old-age pension insurance scheme by 1 January 2015 at the latest.

In the first two case groups, the DRV will likewise not demand any pension insurance contributions in future for the current employment.

This decision by the DRV falls short of the expectations of many company lawyers. In particular, the DRV has failed to take account of the call made in literature to grant protection of confidence on the basis of the formulations in the exemption notification. Irrespective of the question of how the individual exemption notification is to be assessed, the DRV grants protection of confidence in the above mentioned cases only.

Solution approach of the legislator

The legislator is now also concerning itself with the exemption of in-house lawyers from compulsory membership of the statutory old-age pension scheme. Federal Minister of Justice Heiko Maas presented a benchmark paper on the new ruling on 13 January 2015. According to this benchmark paper, the wording of the Federal Lawyers' Act (BRAO) should be adapted. In particular, the double-profession theory should be abandoned. In future, a lawyer employed with a company should become a compulsory member of the Bar Association. Additionally, special rulings should be made concerning settlement; in particular, the Lawyers' Remuneration Act (RVG) should not apply, court representation should be limited and specific criminal-procedure regulations on the right to refuse to give evidence should not apply.

The BMJV is now working on a specific legislative proposal which will precisely reflect these individual points. Based on current estimates, the changes could come into force as early as the middle of 2015.

What consequences can employers draw from current developments?

To obtain protection of confidence for the past, companies must register all in-house lawyers with the DRV by 12 February 2015 at the latest, in so far as these are unable to produce an exemption notification for their current employment and have not yet reached the age of 58 as at 31 December 2014. This will enable them to create legal clarity for the past and the future.

In all cases, companies should require their in-house lawyers to apply for a new exemption or confirmation of the continued validity of their old exemption, while at the same time not relinquishing membership of the professional pension scheme – in order to avoid pension gaps.

Employers who do not register their in-house lawyers although they are not exempt from compulsory pension insurance for their current employment, risk a demand for back payment of contributions from the DRV, including for the period before 1 January 2015 up to the limit for statute barring, as well as criminal prosecution (Section 266 a StGB (Criminal Code)) of themselves or their executive bodies.

Summary: Even if the DRV has fallen well short of the expectations of company lawyers, its publication dated 12 December 2014 has created legal clarity and offered employers a possible solution in the current unclear situation. The benchmark paper put forward by the BMJV gives rise to hope of speedy statutory clarification of the legal position, thus also enabling those in-house lawyers who have to be registered with the DRV by their employers to obtain a new exemption as soon as possible.

More flexible parental leave and caregiver leave

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With effect from 1 January 2015 the new "Parental Allowance Plus" was introduced, together with an enforceable entitlement of employees to the granting of family nursing-care leave. Employers are faced with increasing flexibilisation of working-time models, yet employees are also being offered incentives to return to their gainful employment.

The "very grand coalition" is untiring in its passing of employment-law reforms. In principle, the aim of improved compatibility of work and family must by all means be welcomed. Nevertheless, it is also creating personnel planning challenges for companies. Common to the two legislative amendments concerning the parental allowance and the legal entitlement to family nursing-care leave is the fact that companies may have to do without the (full) working capacity of an employee at relatively short notice.

The new "Parental Allowance Plus"

One parent can claim the parental allowance for a total of 12 months in the period from the birth of a child up until the age of 14 months. This was previously the case and also remains applicable in principle. Nevertheless, the legislator has now extended the entitlement to parental allowance in favour of parents in certain cases.

The first reform is the "Parental Allowance Plus": instead of claiming the parental allowance for one month, employees can also draw the Parental Allowance Plus for two months (Section 4 Subsection 3 Sentence 1 BEEG (Parental Allowance and Parental Leave Act)). This can be decided anew for each month. This means that the employee can double the maximum payment period. In return, the Parental Allowance Plus paid out is just half the amount of the regular parental allowance. As the payment period is extended, a smaller share of the parental allowance falls "victim" of the crediting as per Sections 2, 3 BEEG if one parent engages in part-time employment. Additionally, the Parental Allowance Plus can also still be claimed after the age of 14 months (Section 4 Subsection 1 Sentence 2 BEEG).

"Partnership bonus"

A further new aspect of the parental allowance is the "partnership bonus". If both parents simultaneously engage in gainful employment for an average of between 25 and 30 hours per week for four consecutive months, each parent is entitled to four additional monthly amounts of Parental Allowance Plus for these months (Section 4 Subsection 4 Sentence 3 BEEG). This

is intended to benefit parents who wish to share child care and gainful employment.

Later parental leave

There are also changes to details of the rulings on parental allowance. In future, it will also be possible to take up to 24 months parental leave between the child's third and eighth birthdays. The consent of the employer is no longer required. The parental leave can be spread over three periods; the employer can only refuse a third period for compelling company reasons (Section 16 Subsection 1 Sentence 7 BEEG).

A legal entitlement to family nursing-care leave

The reform of the Family Nursing Care Act (FPfZG) also contains a far-reaching change. The term family nursing-care leave is understood as meaning the release of employees if they look after a close relative in need of care in the home environment (Section 2 Subsection 1 Sentence 1 FPfZG). Whereas it was previously only possible to take family nursing-care leave with the consent of the employer, the legislator has now upgraded this into a legal entitlement of the employee. A precondition is that the employer has more than 25 employees (excluding trainees). Accordingly, an employee who has to care for close relatives must be released for a maximum period of 24 months (Section 2 Subsection 1 Sentence 1 FPfZG). The reduced working time must be at least 15 hours per week over an average for the year (Section 2 Subsection 1 Sentence 2, 3 FPfZG).

To finance the family nursing-care leave, employees are entitled to an interest-free loan from the Federal Ministry of Family Affairs and Civil Duties (Section 3 Subsection 1 Sentence 1 FPfZG).

Employer and employee must reach a written agreement on the extent by which working hours are to be reduced and on which weekdays the employee will work (Section 2a Subsection 2 Sentence 1 FPfZG). The employer must comply with the wishes of the employee, unless compelling company reasons stand in the way of this (Section 2a Subsection 2 Sentence 2 FPfZG). As is so often the case however, there is still legal uncertainty concerning which case groups the courts will include in this category.

Summary: The new working-time models quickly create a situation for companies in which they have to grant an employee release or part-time work. Superiors are therefore well advised to continue to also show an interest in the private matters of their employees. This will prevent such situations from arising completely unexpectedly.

New risks when using outside personnel

LAG Baden-Württemberg,
judgment dated 3.12.2014, file ref. 4 Sa 41/14 and
judgment dated 18.12.2014, file ref. 3 Sa 33/14

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Contracts of employment or contracts for work and services are frequently concluded with external parties when using outside personnel. For the purpose of safeguarding the construction, the external party has a license for the hiring out of temporary employees. Precisely this safeguard now appears to be under threat.

The State Labour Court (LAG) Baden-Württemberg disturbed the pre-Christmas calm in 2014 with a dispute between two of its Divisions. The 4th Division declared that a construction commonly used in business constitutes an abuse of law. In cases in which outside personnel is used via contracts of employment or contracts for work and services, the external service provider/party to the contract for work and services normally also has a license for the hiring out of temporary employees in accordance with Section 1 AÜG (Law on Temporary Employment). This is a precaution against cases in which one of the employees concerned, a social insurance carrier or even the Employment Office is of the opinion that the specific deployment does not constitute a contract of employment/contract for work and services, but by its nature the hiring out of temporary employees. The license as per Section 1 AÜG then ensures that the employee concerned does not by law become an employee of the principal as per Section 9 Subsection 1 AÜG.

Bombshell in Stuttgart – institutional abuse of law?

In a decision dated 3 December 2014 (4 Sa 41/14), the 4th Division of the LAG saw this construction, which not least takes account of the legal uncertainties in terms of the treatment by the social insurance carriers and the Employment Office of the definition of contracts of employment and contracts for work and services as (unlawful) hiring out of temporary employees, as constituting an "institutional abuse of law". In its opinion, a party can only invoke the protection under Section 1 AÜG if the contract with the principal expressly describes the contractual relationship as the hiring out of temporary employees, and this is reflected in the contract formulation with both the principal as well as with the employee. This institutional abuse of law does not in itself justify analogous application of the exception ruling of Section 9 AÜG, which results in the creation of an employment relationship with the hirer/principal. However, the 4th Division of the LAG Baden-Württemberg is of the opinion that – given the lack of transparency with respect to the em-

ployee concerned – disloyal conduct is given, which prevents both companies involved from invoking the license for the hiring out of temporary employees.

Disloyal conduct

The 4th Division of the LAG Baden-Württemberg considered the disloyalty as lying in the fact that, although the contractual employer (hirer) had drawn attention in the contract of employment to the applicability of a collective wage agreement for temporary employees, he had however avoided the unambiguous use of the term "hiring out of temporary employees". The agreements between the principal (hirer) and the service provider/party to the contract for work and services (party hiring out) also failed to take account of the formal aspects and requirements of Section 12 AUG. Finally, the principal (hirer) had always paid strict attention in his internal organisation to differentiating between own core personnel and outside staff. These had been identified accordingly during meetings and at the place of work. Furthermore, the principal had, by his own accounts, covered approximately half of his work volume through external partners.

Contrary opinion of the 3rd Division

The 3rd Division of the LAG Baden-Württemberg took the opposite view on 18 December 2014 (3 Sa 33/14). Based on the case law of the BAG from 2013, the 3rd Division is of the appropriate opinion that direct application of Section 9 AÜG is excluded due to the existence of a license for the hiring out of temporary employees, and that analogous application is inadmissible due to a loophole in the regulations. Such an opinion can likewise not be justified via the principles of abuse of law or disloyalty as per Section 242 BGB (German Civil Code). The 4th Division of the LAG Baden-Württemberg nevertheless allowed an appeal on a point of law against its own decision.

It therefore remains to be seen whether the BAG stands by its previous view or agrees with the opinion of the 4th Division of the LAG Baden-Württemberg.

Summary: The use of outside personnel is increasingly becoming a "danger-prone activity" for employers. The Federal Ministry of Labour and Social Affairs is constantly putting forward new draft legislation for combating the hiring out of temporary workers and contracts for work and services. The State Labour Courts are also increasingly finding ways of curbing the existing options. This is being accompanied by decisions of the social insurance carriers and Employment Offices which are also aimed at encouraging employees back into the "primary job market". The situation remains interesting and we will continue to keep you up to date.

Termination to the next admissible date as a precautionary measure

BAG judgment dated 10.4.2014 – 2 AZR 647/13

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Even notice of termination to the next admissible date, served purely as a precautionary measure ("alternatively"), is effective if the termination date can be determined by the employee.

The decision by the Federal Labour Court (BAG) was based on the following facts: the employee had been employed as a service technician since July 2000. The contract of employment provided for a period of notice of four weeks to the end of a quarter and also referred to collective wage agreements of the Hesse Retail Trade, under which a period of notice of 5 months to the end of a month was applicable. The statutory notice period as per Section 622 BGB was 4 months to the end of a month. The employer got into economic difficulties in 2007. A proposal was put to the employee that he should start work in another company, H-KG. H-KG worked with the employer as technical customer service. Without termination or written cancellation of his old employment relationship, the employee concluded a contract of employment with H-KG with effect from 1 July 2007; nevertheless, he was handed a reference, his social insurance documents and wage-tax card. On 29 July 2011, the original employment relationship between employer and employee was terminated "as a precautionary measure to the next admissible date"... "although we are of the opinion that the employment relationship was already ended in 2007". The BAG considered this termination to be effective.

The starting point for the considerations of the BAG is Section 158 Subsection 2 Sentence 1 BGB. If notice of termination is served "as a precautionary measure" or "alternatively", this is not a condition that would stand in the way of the effectiveness of the termination. The supplement "alternatively" or "as a precautionary measure" merely makes it clear that the employer is primarily invoking other termination circumstances (see also BAG dated 23.5.2014 – 2 AZR 54/12). This is therefore an admissible legal condition subsequent as defined in Section 158 Subsection 2 BGB. The effect ends if it becomes clear that the employment relationship has already been ended at an earlier date.

Since, in this case, the employment relationship with the Defendant had not been ended beforehand in accordance with Section 623 BGB, this legal condition became applicable and this notice of termination constitutes the authoritative termination circumstances.

Notice of termination served "as a precautionary measure" or "alternatively" is an admissible legal condition as defined in Section 158 Subsection 2 BGB.

No indication of an ending date required if this can be determined by the employee.

In the opinion of the BAG, the effectiveness of the termination is likewise not nullified by the fact that the letter of termination did not expressly state an ending date. The BAG affirms its case law, according to which a letter of termination must not necessarily include a specific date, if the employee can determine the period of notice without the need to engage in extensive investigations or answer difficult legal questions. In this context, the BAG considers that the employee can, in particular, also be reasonably expected to obtain information himself/herself on the content of a collective wage agreement, and to ascertain the correct period of notice from several contradictory periods of notice (contract, law, collective wage agreement).

Practical recommendation

If the notice of termination is "follow-up notice of termination" of an employment relationship that has already been terminated or allegedly otherwise ended, the termination should however make it clear that it is precautionary termination of an employment relationship that may still exist, and that the "existing" employment relationship is not being terminated if the notice period for the previous termination has already expired.

Even if it is possible to terminate merely to the next admissible date, we also recommend stating a specific ending date, combined with the supplement that notice of termination is being served to the next admissible date as a precautionary measure.

Summary: Notice of termination can be served as a precautionary measure. This form of termination is also effective if three contradictory notice periods are of relevance, and the employer does not specifically state the ending date.

Frequent short illnesses as reason for termination without notice

BAG, judgment dated 23.1.2014 – 2 AZR 582/13

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If an employee is repeatedly ill for short periods over a number of years and burdens the employer with corresponding costs for continued payment of remuneration, ordinary dismissal of the employee is fundamentally possible. If, however, an employee cannot be dismissed ordinarily as a result of a ruling in the contract of employment or collective wage agreement, the question arises of whether frequent short illnesses can also justify termination without notice. In this respect, the Federal Labour Court (BAG) has decided that frequent short illnesses can also be an important reason for termination without notice in exceptional cases. Nevertheless, this is only possible in absolutely exceptional circumstances.

Facts

The Claimant has been employed with the Defendant since 1981 and cannot be dismissed ordinarily due to rulings in the collective wage agreement. Between 2000 and 2011, the Claimant was unfit for work for an average of 18 weeks per year as a result of various illnesses. In the period between spring 2010 and spring 2012, the Claimant was ill for an average of "only" 11.75 weeks per year. On 28 March 2012, the Defendant dismissed the Claimant without notice with a social phase-out period up until 30 September 2012. The Claimant filed legal action for unfair dismissal. The Labour Court Hamburg and the State Labour Court Hamburg ruled in favour of the Claimant. The Federal Labour Court affirmed these decisions.

Legal assessment

The BAG stated in favour of the employer that frequent short illnesses, or the related negative prognosis of future illnesses, fundamentally constitute a reason for dismissal entitling the employer to terminate without the time pressure of the two-week period under Section 626 Subsection 2 BGB. As the frequent short illnesses are a so-called permanent situation, the two-week period does not begin once only, but rather is continuously starting anew.

In the opinion of the BAG, however, there was no important reason for termination without notice in the case at hand.

The BAG explained its decision by stating that the course of the illness-related periods of absence of the Claimant did not justify

the prognosis that the Claimant would in future be absent on the same scale as in the past ten years. In addition, the Claimant had not been ill again in the period from 19 December 2011 up until receipt of the notice of termination on 28 March 2012, a fact that also indicated a declining trend.

It was also necessary for the employment relationship between the employer and the employee to be genuinely "bereft of content", i.e. in the event of continuation of the employment relationship the employer would be required to make significant remuneration payments without any noteworthy work performance in return.

In the opinion of the BAG, this does not apply even given annual absence of 18 weeks since, even in this case, the employee was still fit for work for almost two thirds of the annual working time and was therefore capable of being used meaningfully.

Summary: The decision by the BAG is relevant in particular in cases in which the possibility of ordinary termination is excluded by the contract of employment or the collective wage agreement. In these cases, the only remaining option left to the employer for unilateral ending of the employment relationship is that of termination without notice. The BAG places high demands on termination without notice based on frequent short illnesses, with the result that termination without notice can only be considered in extreme situations. The original employment relationship must be "bereft of content". It can also be inferred from the decision that frequent short illnesses constitute a permanent situation, in which the two-week period for termination as per Section 626 Subsection 2 BGB continuously begins anew.

Appraisal of performance in references

BAG, judgment dated 18.11.2014, 9 AZR 584/13

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In a dispute concerning correction of a reference, the employee bears the burden of producing evidence and proof to support the claim that his/her performance was "good" and not merely "satisfactory" as stated by the employer.

Under Section 109 Sentence 2 GewO (Industrial Code) employees are entitled to a qualified employment reference including a final overall appraisal (BAG dated 14.10.2003 – 9 AZR 12/03). This appraisal is frequently the all-important sentence for personnel managers. To this end, a grade scale has become established in practice that is expressed through the following formulations:

- "always to our utmost satisfaction" = grade 1
- "always to our complete satisfaction" = grade 2
- "always to our satisfaction" = grade 3
- "to our satisfaction" = grade 4
- "overall to our satisfaction" = grade 5

If employer and employee disagree concerning the overall grade, the question arises in a legal dispute for the correction of a reference as to who is required to demonstrate which quality of performance.

Use of the formulation "to our complete satisfaction"

Matter in dispute: overall grade

In this respect, the Federal Labour Court (BAG) has thus far adopted a pragmatic approach. It assumes an average appraisal, i. e. satisfactory, as mean point of the grade scale. The burden of producing evidence and proof for a poorer appraisal ("adequate" or "poor") lies with the employer, for a better appraisal ("good" or "very good") with the employee (BAG dated 14.10.2003 – 9 AZR 12/03).

Federal Labour Court

In the case at hand, the Labour Court Berlin and the LAG Berlin-Brandenburg had broken with this case law by assuming that in modern-day business life "average" is no longer a satisfactory but rather a good performance. This was confirmed by studies consulted, which showed that almost 90 percent of the employment references examined contained the overall appraisal good or very good. Consequently, the employer bears the burden of producing evidence and proof if he wishes to issue a satisfactory (= below average) appraisal. The employee is only required to demonstrate a very good performance.

Labour Court Berlin and LAG Berlin-Brandenburg

BAG affirms previous opinion

The BAG did not agree with the opinions of the previous instances and, by contrast, again affirmed its previous position. "Average" remains a satisfactory and not a good performance. The possibility cannot be excluded that the studies consulted included accommodation references. An employment reference is governed by a duty to tell the truth. There is no reason to alter the principles of the allocation of the burden of producing evidence and proof.

Summary: The BAG affirms its previous case law. The employer bears the burden of producing evidence and proof for an adequate or poor overall appraisal, and the employee bears the burden of producing evidence and proof for a good or very good overall appraisal.

Minimum remuneration for nursing care

BAG, judgment dated 19.11.2014 – 5 AZR 1101/12

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The Federal Labour Court (BAG) was required to decide whether the minimum remuneration payable in the nursing care sector is also applicable to periods on-call and emergency stand-by duty. This decision is of significance for answering the question of whether the above mentioned times are liable to remuneration at the minimum wage of 8.50 euros gross under the Minimum Wage Act (MiLoG).

The Claimant was employed by the Defendant, a private nursing-care service. She worked on a two-week around-the-clock basis, during which she was obliged to remain on site on the Defendant's premises. The Defendant remunerated the Claimant's work in part only. Emergency stand-by duty was not subject to the minimum remuneration under the Regulation on Nursing-Care Working Conditions (PflegeArbbV) dated 15 July 2010. By contrast, the Claimant argued that the minimum remuneration of 8.50 euros per hour under Section 2 Subsection 1 PflegeArbbV was payable for all forms of work, i.e. including emergency stand-by duty.

In the opinion of the BAG, the minimum wage as per Section 2 PflegeArbbV is determined "per hour". The regulation is not tied to either the type or the intensity of the work (full work, on-call, emergency stand-by duty) but rather is based on the working time liable to remuneration. Periods on-call and emergency stand-by duty, during which the employee is required to be available at a location stipulated by the employer so as to be able to start work immediately in case of need, is work liable to remuneration as defined in Section 611 Subsection 1 BGB. A separate remuneration ruling can be made for these special forms of work and lower remuneration envisaged than for full work. However, the regulator has not made use of this option in the nursing care sector. Accordingly, periods on-call or on emergency stand-by duty must be remunerated at the minimum rate as per Section 2 PflegeArbbV. Agreements that deviate from this are ineffective.

Periods on-call and emergency stand-by duty as working time liable to remuneration.

The regulator has reacted to this and agreed a deviating ruling for the remuneration of emergency stand-by duty and increased the minimum remuneration in the 2nd PflegeArbbV dated 28 November 2014. Under this ruling, the period of emergency stand-by duty, including the work performed, can be assessed

Remuneration of periods on-call and stand-by emergency duty in the nursing care sector.

as at least 25 percent of working time for the purpose of calculating the remuneration. A prerequisite for this is a collective-agreement or written individual contractual ruling (see Section 2 Subsection 3 PflegeArbbV dated 28.11.2014).

Remuneration of periods on-call and stand-by emergency duty under the MiLoG.

A national minimum wage has been in force in Germany since 1 January 2015. The MiLoG does not contain any ruling on the question of whether the minimum wage is also payable for periods of emergency stand-by duty or periods on-call. Section 1 Subsection 1 MiLoG merely states: "With effect from 1 January 2015, the level of the minimum wage is 8.50 euros gross per clock hour." As the legislator does not differentiate in terms of the form or intensity of the work but merely refers to work per clock hour, the above decision will almost certainly mean that periods on-call and on emergency stand-by duty must be paid at the minimum wage (currently 8.50 euros), and that rulings providing for lower remuneration will be ineffective (see Section 3 MiLoG). A different situation will apply for collective wage agreements that have been extended in accordance with the Law on the Posting of Workers (AEntG), or for statutory instruments, such as the 2nd PflegeArbbV, adopted in accordance with Section 11 AEntG. These can provide for an hourly wage of less than 8.50 euros gross per hour until 31 December 2016 at the latest (see Section 24 Subsection 1 MiLoG).

Summary: In view of the legal consequences of failure to pay the minimum wage under the MiLoG (administrative offence in accordance with Section 21 MiLoG, exclusion from the awarding of public contracts in accordance with Section 19 MiLoG, criminal liability based on withholding and misappropriation of work remuneration as per Section 266a StGB (Criminal Code)), employers should remunerate periods on-call and emergency stand-by duty at the minimum wage until such time as the Supreme Court decides otherwise in this matter. Employers in the nursing care sector can agree remuneration for the above periods at an hourly rate below the minimum remuneration as per the 2nd PflegeArbbV through collective-agreement or written individual contractual rulings.

Additional holiday for older employees

BAG, judgment dated 21.10.2014, 9 AZR 956/12
Press Release no. 57/14

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Age-related graduating of holiday entitlement can be admissible if necessary, appropriate and justified by a legitimate objective.

The Defendant employer is a shoe company, not bound by a collective wage agreement, that grants its production workers two additional days of recuperation holiday per calendar year after reaching the age of 58. The Claimant, born in 1960, is of the opinion that this constitutes inadmissible discrimination against younger employees. The Claimant should also receive 36 instead of the previous 34 days holiday.

The Federal Labour Court dismissed the legal action. The employer's actions do not constitute inadmissible age discrimination. This ruling does result in unequal treatment of younger employees compared to their older colleagues. However, given the presence of particular employment and working conditions, this can be justified in the interests of ensuring the occupational protection of older employees.

In the view of the Federal Labour Court, the employer is justifiably entitled to assume that employees who perform physically tiring and heavy work producing shoes in its production plant require longer recuperation periods than younger colleagues after reaching the age of 58. The granting of two additional days holiday is a suitable, necessary and appropriate means of achieving this legitimate objective. The age-related graduation of holiday entitlement was therefore considered admissible under Section 10 Subsection 3 No. 1 AGG (General Equality of Treatment Act).

Age-related graduation of holiday entitlement can be admissible.

Ensuring the occupational employment of older employees is a legitimate objective.

Summary: In its judgment dated 20 March 2012, file ref. 9 AZR 529/10, the Federal Labour Court declared that the age-related graduation of holiday entitlement in the public sector collective wage agreement (TVÖD) was inadmissible. The TVÖD provided for a graduation of 26 days (up to age 30), 29 days (up to age 40) and 30 days (from age 40). A number of collective wage agreements and employment contracts were "corrected" as a result. The 9th Senate has now made it clear that age-related graduation of holiday entitlement does not generally constitute inadmissible discrimination. It can be justified for the purpose of protecting older employees, particularly those who carry out strenuous physical work.

No entitlement to financial compensation for Works Council duties outside of working hours

BAG, judgment dated 28.5.2014, 7 AZR 404/12

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Based on the decision of the Federal Labour Court (BAG), a member of the Works Council is only entitled to financial compensation for time spent on Works Council activities outside of working hours if compensation in the form of corresponding paid time off in lieu is not possible for operational reasons. This can only be assumed if the employer invokes this and therefore refuses to grant time off in lieu.

The parties are essentially arguing about claims to compensation asserted by the Claimant – an employee of the Defendant – for work for the Works Council. Before these claims were asserted, the Defendant had terminated the employment relationship with the Claimant without notice for operational reasons and with a social phase-out period. The Claimant was released from her work duties during the subsequent legal action for unfair dismissal. Although the Claimant won the legal action for unfair dismissal, she did not exercise her legal entitlement to continued employment and did not resume her work as company doctor. Nevertheless, the Claimant continued to perform duties for the Works Council up until the end of the employment relationship – by her own accounts both during her (fictitious) working hours as well as during the period of release, which was expressly described as holiday time.

Through her legal action, the Claimant is asserting that time off in lieu should have been granted for all hours spent on her activities for the Works Council. As this is now no longer possible due to the ending of the employment relationship, the time must be the subject of compensation. She was not obliged to work either during the dispute for unfair dismissal or during the release phase, and therefore performed all duties outside of her working hours. The Labour Court as well as the State Labour Court largely dismissed the legal action. The appeal on a point of law was unsuccessful.

As a fundamental rule, activities for the Works Council must be performed during working hours.

In the opinion of the Federal Labour Court, the precondition for an entitlement to compensation for Works Council activities, required under Section 37 Subsection 3 Sentence 3 Half-Sentence 2 BetrVG (Works Council Constitution Act) is not satisfied through mere notification of work for the Works Council performed during leisure time. This is because members of the Works Council fundamentally do not receive official remuneration for their work

on the Works Council under the principle of lost pay, nor is work for the Works Council a work performance to be remunerated. The time off in lieu, regulated in Section 37 Subsection 3 Sentence 1 BetrVG for Works Council activities performed outside of working hours, applies only to the consequences of a deviation, made necessary by operational reasons, from the principle that Works Council duties must be performed during working hours.

Remuneration of duties for the Works Council can be considered in exceptional cases if the time off in lieu is not possible for reasons within the employer's sphere of control. Impossibility of release from work for operational reasons can only be assumed if the employer invokes this and therefore refuses time off in lieu. As long as these preconditions are not given, a member of the Works Council is dependent on claiming time off in lieu and, if necessary, asserting this through the courts. In this respect, the member of the Works Council must also actually demand time off in lieu from the employer.

Entitlement to compensation only if release from work is not possible for operational reasons.

The mere notification of Works Council duties performed during leisure time is not sufficient. Even in the case of high entitlements to time off in lieu, the decision on whether to invoke operational reasons and pay remuneration for additional work or possibly grant extensive release from work lies with the employer. According to the BAG, operational reasons are by all means not given if the member of the Works Council decides to perform duties for the Works Council during his/her holiday.

Right of the employer to choose between paying remuneration for additional work or granting release from work.

Summary: As a fundamental rule, activities for the Works Council must be performed during working hours. If a member of the Works Council has performed duties for the Works Council outside of his/her personal working hours for operational reasons, he/she has an entitlement to paid time off in lieu. The Works Council member must assert this entitlement. If the employer is unable to grant the release from work within one month for operational reasons, the Works Council member will become entitled to financial compensation. The decision to invoke operational reasons and to pay remuneration for additional work or grant corresponding time off in lieu is the responsibility of the employer. As such, the employee does not have a right of choice.

Plurality of collective wage agreements – questioning concerning trade-union membership

BAG 18.11.2014 – 1 AZR 257/13

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Even if the Federal Cabinet adopted draft legislation for a law on uniform collective wage agreements in December 2014, the principle of plurality of collective wage agreements remains applicable until such time as this comes into effect. The scope of any related right of employers to ask about membership of a trade union is the subject of a new decision by the Federal Labour Court.

Plurality of collective wage agreements is understood as meaning the phenomenon that several collective wage agreements claim to apply in a company for different employment relationships, without claiming application for the same employment relationship; the last of these cases is the so-called multiplicity of applicable collective wage agreements.

Having given up its case law on so-called uniform collective wage agreements (application of just one collective wage agreement) given plurality of collective wage agreements through a decision in 2010 (BAG 7.7.2010 – 4 AZR 549/08), the Federal Labour Court was now required to clarify a follow-up question.

Consequential problem of plurality of collective wage agreements.

It had to decide whether an employer in a company with a plurality of collective wage agreements has the right to enquire concerning the respective trade-union membership of the employees. In its decision, the Federal Labour Court was able to leave the question unanswered of whether an employer fundamentally enjoys this right or not in a company with a plurality of collective wage agreements. This possibility resulted from the fact that, in the legal dispute now decided by the Federal Labour Court, the trade union had motioned for the employer to be ordered to refrain from questioning the employees of its company concerning membership of the trade union in question; this motion covered all conceivable questions and was too broadly defined, meaning that it could not succeed for this reason alone.

Exceeding the limits of the right to ask questions.

Irrespective of this, the Federal Labour Court indicated that, in the specific case, the employer had, through the form and nature of the questioning, by all means violated the basic right of the trade union taking action under Art. 9 Subsection 3 Basic Law (basic right to act in coalition). Because the purpose of the employer's question was not, for example, to determine

the members of the trade union, with which the employer had already concluded a collective wage agreement and which he intended to apply to the members of this trade union following determination. Rather, the purpose was to identify the members of the trade union (taking legal action) that had called on its members to participate in a strike ballot, because it was unable to agree on a collective wage agreement with the employer. The question asked by the employer was aimed at finding out who would participate in a forthcoming strike, so as to be able to prepare accordingly and, by so doing, reduce the effects of the strike. The questioning was therefore aimed at influencing the forthcoming industrial dispute. This was the fact triggering the inadmissibility of the question.

The Federal Labour Court did not ascertain any general inadmissibility of the employer's enquiries concerning respective trade-union membership in a company with a plurality of collective wage agreements. Given a justified interest on the part of the employer, which is not offset by prevailing interests of the employee, the question will be admissible. As set out correctly in the reasons of the previous instance for its judgment, the employer's interest will by all means prevail if the matter involves clarification of the question of which work conditions are applicable to an employment relationship. Without knowledge of the corresponding wages, the employer is unable to calculate the social insurance contributions, as their level is based on the wage owed and not on that paid (LAG Hesse 7.11.2012 – 12 Sa 654/11).

By contrast if, in exceptional cases, trade-union membership is not of interest because the employment contracts make reference to the more favourable collective wage agreement for the employees anyway, the right to question is unlikely to exist.

Summary: Given a prevailing justified interest in the answer, the employer in a company with a plurality of collective wage agreements is entitled to ask his employees concerning their respective trade-union membership.

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.

Publications

Dr Johan-Michel Menke, LL.M. and **Thomas Schulz, LL.M.** have written the following articles together with Thomas E. Herrich, Authorised Manager and Member of the Management Board of Hertha BSC GmbH Co. KGaA: "Training group 2 instead of 1st team: Entitlement to employment and right of transfer in (professional) soccer as reflected in case law" (Zeitschrift für Sport und Recht, Issue 5, September/October 2014) and "Player employment: 'practice group 2' employment rights" (World Sports Law Report, Volume 12, Issue 10, October 2014).

Bernd Weller has commented in the magazine "Arbeit und Arbeitsrecht" (AuA 2015, 54) on the decision of the Federal Labour Court (BAG) dated 25 June 2014 (7 AZR 847/12), in which the BAG rejected a general right of continued indefinite employment for Works Council members with fixed-term employment contracts.

In AuA 2014, 504, **Bernd Weller** explains the interaction between data protection officer, employer and the rights of the Works Council in data protection matters.

In BB 2014, 3139, **Bernd Weller** comments on a decision of the Federal Labour Court (25.6.2014 – 7 ABR 70/12) concerning the limits on the appointment of external lawyers by the Works Council.

Dr Sascha Schewiola has published a comment on the consent of the Office for Integration to termination without notice with a phase-out period in Magazine 1/2015 of the "Arbeits-Rechts-Berater".

In Magazine 12/2014 of the "Arbeits-Rechts-Berater", **Dr Sascha Schewiola** tackles the question of indirect disadvantaging of applicants for pilot training, if the collective wage agreement prescribes a minimum height for applicants as a precondition for employment.

Astrid Reich and **Dr Matthias Kühn** have published a paper on the subject "Liability for payment of the minimum wage to outside employees" in the "Betriebsberater 2014" (magazine 48, page 2938 et seq.).

A paper by **Dr Wilhelm Moll, Veit Pässler** and **Astrid Reich** on the subject of "The statutory minimum wage – fundamental principles, practical problems and risks" has appeared in the "MDR" (3/2015, page 125 et seq.).

Lectures

On 18 March 2015 **Bernd Weller** will be speaking in Munich for the Beck Academy on the subject of "Works Council Constitution Act for Beginners"; the event entitled "Works Council Constitution Act for Professionals" will take place at the same location on 19 March 2015.

Astrid Wellhöner and **Bernd Weller** will be speaking at the Summer School Employment Law for the Beck Academy in Munich from 29 to 31 July 2015.

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Dr Roland Czycholl, LL.B. has been strengthening the Employment Law Team at our Hamburg office since October 2014. Dr Roland Czycholl, LL.B. studied law at the Bucerius Law School in Hamburg as well as at the University of Sydney. Following his First State Examination in summer 2009, he worked as a research assistant in the Professorship for Employment Law of Prof Dr Matthias Jacobs at the Bucerius Law School. Parallel to this, he studied for a Ph.D. with Prof Dr Matthias Jacobs on a subject related to collective employment law. He qualified as Dr jur. in summer 2013. Between 2012 and 2014 he completed his legal clerkship at the Hanseatic Higher Regional Court in Hamburg, including spells at the German Embassy in Pretoria as well as with SV Werder Bremen GmbH & Co KG. In summer 2014, he spent the final elective period of his legal clerkship at our Hamburg office, where he then began his work as Associate after passing the Second State Examination.

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