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Newsletter
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Dear readers,

we welcome your interest in our new "Employment Law" Newsletter. In this edition we have again compiled an overview of the most important developments and decisions of practical relevance in the field of employment law.

A development of important practical relevance is a decision by the BAG (Federal Labor Court) under which temporary employees must, for the first time, also be taken into consideration in the context of company co-determination. The decision concerned the number of employees under Section 9 MitBestG (Co-Determination Act) (election of employee representatives to the Supervisory Board by delegates or directly). An interesting aspect remains whether temporary employees are also of relevance for the question of whether the one-third participation as per the DrittelbG (Law on One-Third Participation) or equal-representation co-determination as per the MitBestG is applicable.

Also of major practical relevance is the decision of the ECJ on adaptation of the vacation entitlement if an employee's weekly working hours alter during the current year. The ECJ had already repeatedly decided that a reduction in working hours from full time to part time does not result in complete recalculation of the vacation entitlement. Rather, the employee is entitled to the pro-rata vacation of a full-time employee for those months in which he/she has worked full time. It has now consistently decided that the same applies in the event of a switch from part time to full time.

The BAG has now once again established that supplementary remuneration of overtime can only be considered if the employee can not only submit and demonstrate that he/she has worked overtime, but also that this was necessary or had been ordered.

The LAG (State Labor Court) Schleswig-Holstein does not consider a planned reduction in personnel to be confidential. As soon as the works council is involved, employers must therefore reckon with the possibility of the works council informing the staff of the planned measure.

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 specializing 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.

Reduction in personnel as business secret

LAG Schleswig-Holstein, ruling dated 20.5.2015 – 3 TaBV 35/14 (final and absolute)

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A planned reduction in personnel is not automatically confidential. In the absence of corresponding precautions by the company, the works council is entitled to inform the staff extensively of this.

In cases of planned changes in business operations, in particular measures to reduce personnel, companies regularly have an interest in not informing the staff from the outset, but rather not until a specific time. But is a reduction in personnel automatically to be regarded as a company and business secret as defined in Section 79 BetrVG (Works Constitution Act)?

The State Labor Court Schleswig-Holstein (hereinafter referred to briefly as LAG) has denied this in a case, in which a pharmaceuticals company near Hamburg had declared information concerning a planned reduction in personnel as being strictly confidential. The management had threatened the members of the works council with civil and criminal-law consequences in the event of contravention.

Reduction in personnel not a "born" business secret

In the opinion of the LAG, the planned reduction in personnel did not in itself constitute a business secret as defined in Section 79 BetrVG. Consequently and contrary to the instructions of the employer, the works council was entitled to inform the staff of such measures. According to the LAG, Section 79 BetrVG also protects information that is not accessible to third parties, and thus the competitiveness of the company owner.

Risk of demotivated staff not sufficient

In the opinion of the LAG, the possible impairment of undisrupted operations through the expected unsettling of the staff could not by itself restrict the rights of the works council. Without further points of reference, the works council must be able to communicate extensively with the employees it represents from

the beginning of the information process concerning planned changes to business operations, especially if they are affected. Otherwise, the works council cannot exercise its co-determination rights effectively and properly.

Details possibly confidential

According to the LAG, the fact that a company intends to carry out a reduction in personnel is not therefore subject to confidentiality as such. This applies even if the matter has been expressly marked as confidential. Nevertheless, details of the reduction in personnel can indeed constitute company and business secrets (e.g. the related outsourcing of certain business areas or the adaptation of technical procedures necessitating the reduction in personnel, etc.).

This also has effects in the court proceedings. Companies frequently do not wish to negotiate publicly concerning secrets. However, Section 52 ArbGG (Labor Court Law) does not offer the possibility of excluding the public if nothing is confidential.

Corporately secure scope of action

A company is therefore required to demonstrably mark confidential information as such with respect to the works council. The fact that the works council should not learn of confidential information on a planned measure may frequently stand in the way of forwarding. In cases of doubt, it will also hardly be possible to demonstrate later which member(s) of the works council has/have violated any obligations of confidentiality. To ensure trust-based cooperation with the works council, the management should unmistakably inform the works council of the background to a specific obligation of confidentiality, namely the existence of a company or business secret. Alternatively, the company will have to check the latest possible time for involving the works council ("The matter is starting now"), so as to keep the planned measures secret for as long and to as great an extent as possible.

Summary: The LAG Schleswig-Holstein has strengthened the rights of the works council concerning planned changes in business operations: accordingly, "confidential information" must not yet be kept secret. A Supreme Court decision on the duty of secrecy concerning personnel-reduction measures is still awaited. Until such time as the Federal Labor Court makes a differentiating assessment, the employer must (be able to) present objective criteria for the assumption of a business and company secret that go beyond the desire for undisrupted operations.

Time limitation of an employment relationship as replacement during parental leave

BAG, judgment dated 9.9.2015 – 148/14

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According to the BAG (Federal Labor Court), functional time limitation of an employment relationship as replacement during parental leave does not presuppose that the regular employee has already expressed a request for parental leave – satisfying the requirements of Section 16 Subsection 1 BEEG (Parental Allowance and Parental Leave Act) – at the time of conclusion of the contract with the replacement employee.

In the case before the BAG, the plaintiff worked for the defendant over a period of more than six years on the basis of seven fixed-term employment contracts. The most recent employment contract concluded with him was at the beginning of December 2010, under which he was employed from May 2011, and "for a fixed period up until achievement of the following purpose: end of the parental leave of Ms. B"). In November 2010, Ms. B. had advised that she was pregnant, that the birth was estimated for May 2011, and that she intended to take parental leave of one year. She applied for parental leave of one year following the birth. The plaintiff filed legal action for checking of the time limitation. The Labor Court dismissed the action, the LAG dismissed the appeal. The BAG affirmed the decisions.

AGB (General Terms and Conditions of Business) check, Sections 305 et seq. BGB

The BAG initially established that the pre-formulated agreement on time limitation did not violate the transparency requirement under Section 307 Subsection 1 Sentence 2 BGB (German Civil Code). It considered the agreement between the parties, to the effect that the employment relationship would end upon achievement of the purpose and that the purpose was to replace Ms. B. during her parental leave, to be clear and sufficient. As per its previous case law, it did not carry out an appropriateness check as defined in Section 307 Subsection 1 Sentence 1, Subsection 2 BGB. Under this case law, agreements on time limitation are not subject to an appropriateness check.

Justification of time limitation: replacement during parental leave, Section 21 Subsection 1 BEEG

The BAG then considered the time limitation as justified by the objective reason of replacement for the duration of parental leave in accordance with Section 14 Subsection 1 Sentence 2 No. 3 TzBfG (Law on Part-Time Employment) in conjunction with Section 21 Subsection 1 BEEG. In this respect, it concerned itself mainly with the question – thus far not yet clarified by the Supreme Court and assessed differently in the commenting literature – of whether the effectiveness of the time limitation

is prevented if the regular employee has not yet expressed a request for parental leave – complying with the requirements of Section 16 Subsection 1 BEEG – at the time of conclusion of the contract with the replacement employee, but rather has only advised the claiming of parental leave. The BAG came to the conclusion that neither the wording of the law in Section 21 Subsection 1 and 3 BEEG nor the history of the regulation, nor systematic interpretation indicated that the objective reason of parental-leave representation presupposes that the regular employee had already requested parental leave at the time of concluding the contract with the replacement employee.

Divergence of duration of reason for time limitation and contract term

The BAG also assumed that the objective reason of replacement was not called into question by the fact that the time limitation of the employment relationship was solely for the duration of Ms. B.'s parental leave as from May 2011, although it was foreseeable that Ms. B. would take maternity leave as from the end of March 2011. Because, in addition to the objective reason for the time limitation of the employment relationship, there is no additional need for own objective justification of the contract term granted. If the contract term is shorter than the foreseeable duration of the reason for time limitation, this only calls the reason into question if sensible work by the employee in accordance with the objective reason is not possible. This was not the case in the matter to be decided.

Check on abuse of law

According to the BAG, the time limitation was likewise not ineffective under the principles of institutional abuse of law (Section 242 BGB). The total of seven fixed-term employment contracts and the overall duration of the fixed-term employment relationship of six years and three months, was not considered by the BAG to be sufficient as evidence for the assessment, always required when checking a time limitation, of whether the employer was improperly resorting to fixed-term employment contracts. The plaintiff did not present further evidence for an abuse of law.

Summary: An employer can conclude a fixed-term employment contract with a replacement for the duration of a regular employee's parental leave, if the regular employee has advised him that he intends to take parental leave, but has not yet issued a request for parental leave in accordance with the requirements of Section 16 BEEG.

Compensation for time credits on working-time accounts

BAG, judgment dated 23.9.2015 – 5 AZR 767/13

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With regard to the burden of evidence, the claim to compensation for working-time credits must be differentiated in terms of whether the hours are shown unconditionally in an employer-managed working-time account, or whether they are based on working-time records prepared by the employee himself.

The case to be decided by the BAG (Federal Labor Court) concerned the payout of a working-time credit. After serving notice of termination to March 31, 2012, the plaintiff requested payment of overtime allegedly worked by her. During the period of employment from June 1, 2007 to August 25, 2008, the defendant kept a working-time account for the plaintiff. This working-time account showed a time credit of 414 hours. However, the defendant did not continue to keep this working-time account up until the ending of the employment relationship on March 31, 2012. Instead, the plaintiff noted her working hours independently. In this record of time worked, the plaintiff noted her regular working hours, the start and end of her working hours and break times, as well as additional and shorter work. The plaintiff's record showed a further time credit of 643 hours. In her legal action, the plaintiff claimed both the 414 hours as per her working-time account as well as the further 643 hours, and requested the defendant to compensate her financially for the overtime allegedly worked.

The BAG upheld the legal action in part.

Unconditional crediting to the working-time account means recognition

The BAG established that the 414 hours, credited unconditionally to the plaintiff's working-time account, are to be compensated by the defendant. The entries in the working-time account confirmed the time scope in which the plaintiff had worked her overtime for the defendant. The regular entries in the working-time account did not constitute legal statements by the defendant. Nevertheless, by unconditionally showing credit hours in a working-time account, kept for the individual employee, the employer rendered the balance indisputable. Because this stated that specific working hours had actually been worked with the approval of the employer. As such, the defendant should have set out in detail why the balance – shown unconditionally in the working-time account – is inaccurate. The defendant did not do this.

However, at the time of ending of the employment relationship, the plaintiff had not conclusively set out a time credit in excess of the 414 hours. Because – as in every overtime process – the plaintiff is required to set out and, if necessary, to demonstrate that the work has been carried out in a time scope beyond normal working hours, and that overtime worked has been initiated by the defendant or is at least attributable to the latter. The plaintiff did not do this.

The consequence of this is that, in this case, an employee does not fulfil his burden of evidence merely by setting out the days on which he has worked or has been available for work. Rather, he must also illustrate that overtime has been ordered, approved or tolerated by the employer, or was at least necessary for performance of worked owed. The plaintiff's submission did not satisfy these requirements – accurately set out by the BAG – with regard to the additional 643 hours. The fact that the defendant had deliberately failed to keep a working-time account after November 25, 2008 likewise did not stand in the way of this.

As a result, the BAG therefore makes it clear that the keeping of own working-time records by an employee without demonstrating to what extent this overtime was also necessary or agreed with the employer, is not sufficient for compensation for overtime.

With self-prepared working-time records: employee bears full burden of evidence

Summary: An employee cannot force the employer to provide compensation for overtime by keeping own working-time records but not submitting these to the employer for signature (approval). Conversely, when keeping a working-time account, an employer must check whether the overtime included in the working-time account corresponds to the actual work performed by the employee, and whether the overtime was also necessary or ordered. Because if the overtime is shown unconditionally in the employee's working time account, this will subsequently be considered as conceded in any proceedings concerning compensation for overtime.

Controlling the content of a limited-period transfer of higher-level duties

BAG, judgment dated 7.10.2015 – 7 AZR 945/13

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The BAG has decided that the temporary transfer of a higher-level function is subject only to a content check as per Section 307 Subsection 1 BGB (German Civil Code). The BAG has again affirmed the established Supreme Court case law, according to which the time-limiting of individual contract terms is not to be measured against the standard of Section 14 TzBfG (Law on Part-Time Employment). The objective reasons stated therein can however influence the weighing-up of interests as per Section 307 Subsection 1 BGB.

The plaintiff demanded that her employer continue to employ her as 1st (solo) bassoonist. She initially worked as deputy (solo) bassoonist in the bassoon group of the defendant's orchestra. In this role, she received a basic salary as well as a position allowance of € 304.24 gross per month.

In 2008, the previous 1st (solo) bassoonist became ill on a long-term basis. On October 9, 2008, the parties therefore agreed that the plaintiff would take over the position "on an interim basis" "until such time as the job incumbent recovered, at most however up to July 30, 2009". For this, the plaintiff received an increased allowance of € 608.49 gross per month. The position as 1st (solo) bassoonist was advertised as from September 2009, but not re-filled until September 2012. In the interim, the parties had repeatedly agreed the transfer of the higher-level position, in each case for a limited period, most recently up until September 9, 2012.

The legal action aimed at continued employment was unsuccessful in all instances. The instances consider the time-limiting of the higher-level functions to be effective. In particular it withstands the content check as per Section 307 Subsection 1 BGB.

No direct application of Sections 14 et seq. TzBfG to time limitation of individual contract terms

The BAG initially affirmed its previous case law, according to which the time-limiting of individual contract terms is not subject to control as per Sections 14 et seq. TzBfG. This is only applicable in cases of time-limiting of the entire employment relationship. The time-limiting of individual work terms must be checked solely on the basis of Section 307 Subsection 1 BGB. This does not require any objective reason for the effectiveness of the time-limitation, but rather predominance of the legally recognizable

interests of the employer over those of the employee. However, the objective reasons under Section 14 TzBfG can affect the weighing-up of interests in favor of the employer.

By way of exception, the case law does however require a circumstance for the effective time-limitation of individual contract terms that would justify the time-limitation of an employment relationship overall. This was decided by the BAG for example for a significant increase in working hours (see BAG dated 15.12.2011 – 7 AZR 394/10). A significant increase in working hours involves a significant increase in remuneration. The social-policy purpose of the Law on Part-Time Employment is to ensure a permanent income for the employee. Even in the event of a significantly higher salary payment, he adapts his living situation. The social-policy purpose of the Law on Part-Time Employment must therefore also be taken into account when weighing up interests as per Section 307 Subsection 1 BGB.

Valuations of Sections 14 et seq. BGB take effect in the context of the content check as per Section 307 Subsection 1 BGB

The BAG has not transferred this exception unrestrictedly to the case set out here. In particular, there is no legislative assessment aimed at ensuring a specific hierarchical position. Only if the temporary transfer of a position involves a temporary and significant increase in remuneration does the assessment under the Law on Part-Time Employment apply. Only then can a circumstance be required within the scope of the weighing-up of interests that corresponds to an objective reason as per Section 14 TzBfG.

In the case set out here, the remuneration was increased by only 9 percent through transfer of the higher-level position. In the view of the BAG, this is not sufficient for inappropriate disadvantaging of the plaintiff. The interest of the employer in transferring the position for a limited period only during the search for a new 1st (solo) bassoonist, prevails.

Summary: The temporary transfer of individual contract terms – in particular the transfer of a higher-level position – is not directly subject to the check on objective reasons under Section 14 TzBfG. Rather, case law requires a weighing-up of interests. In this respect, the weighting of the employee's interests increases the more he adjusts his life planning to the changed conditions. In particular in cases of significantly increased remuneration, the employer must have a substantial interest in the time limitation.

Number of vacation days given an increase in working hours

ECJ, judgment dated 11.11.2015, C-219/14

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An increase in an employee's working hours does not result in the need for retrospective re-calculation of the previously acquired vacation entitlement. Nevertheless, post calculation must be made for the period during which working hours were increased.

The underlying facts of the decision are straightforward:

The plaintiff had been employed by the defendant, an English Limited Company, since June 15, 2009 on the basis of an employment contract that provided for working hours and days that differed from week to week. Her vacation entitlement was 5.6 weeks per year. In July 2012, the plaintiff took seven days paid vacation. She had previously worked one day per week. With effect from August 2012, her weekly working hours increased to 41.1. An application for vacation, submitted by the plaintiff in November 2012, was rejected by the defendant with the comment that the plaintiff's vacation entitlement had already been (more than) used up by the vacation days granted in July 2012. After leaving the company on May 28, 2013, the plaintiff demanded financial compensation for vacation not taken. She took the view that, in the event of an increase in working hours, vacation accumulated and taken must be retrospectively "corrected" to conform to the increased working hours and not to the working hours applicable at the time of taking the vacation.

No retrospective "upgrading" of the vacation entitlement for the period before the increase in working hours

The ECJ did not agree with this argumentation and established that EU law does not require post calculation of claims to paid annual vacation – already acquired and possibly already taken – on the basis of the new (increased) working hours in the event of an increase in working hours during the current vacation year. On the contrary, the effect of the increase in working hours as from implementation is such that the vacation entitlement for this – and only this – period has to be post calculated. In this respect, both periods must be considered separately. In terms of the case at hand, this meant that the plaintiff was no longer entitled to vacation for the period prior to the increase, as its scope was to be calculated on the basis of the working hours applicable at the time the vacation was granted. Under this ruling, the plaintiff even received one more day of vacation than she was entitled to. However, this had no effect on the vacation entitlement for the period from the increase up until ending of

Separate consideration of the respective periods

the employment relationship. During this period, the plaintiff acquired the annual vacation of a full-time employee – pro-rata temporis.

Number of vacation days acquired is retained

With reference to its case law on the lack of any effect of the reduction in working hours on the vacation entitlement acquired during preceding full-time employment, the ECJ again emphasized that the taking of annual vacation later than the period in which the claims were created, is in no way related to the hours worked during this later period. Consequently, the vacation entitlement must be calculated separately for each time period. Put precisely therefore, no post but rather re-calculation even for the period after an increase in working hours.

This is made clear by an example:

Given a minimum vacation entitlement of 24 days for a six-day week, an employee working two days per week acquires a vacation entitlement of four days in six months. If he increases the working hours to six days per week in the next six months, a further twelve days vacation are acquired.

In terms of the total number of vacation days, the sequence in which the employee works part-time or full-time is immaterial.

Summary: The ECJ is continuing its previous case law, according to which the existence of vacation entitlements acquired is independent of any change in the employee's working hours. The employee acquires his vacation entitlements according to the scope of the time worked by him in specific time periods. These are retained in the form of a fixed number of vacation days. The employee's working hours at the time of taking the entitlement are immaterial.

Inheritability of the entitlement to compensation for vacation

BAG, judgment dated 22.9.2015 – 9 AZR 170/14

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Once acquired, an entitlement to compensation for vacation is inheritable, and becomes part of the estate as per Section 1922 Subsection 1 BGB (German Civil Code).

An employee asked his employer for vacation compensation of approx. € 4,000.00 gross following his departure from the employment relationship. The employee died during the legal dispute. His heirs continued the legal dispute and demanded payment of the vacation compensation to the community of heirs.

The BAG (Federal Labor Court) was therefore called on to decide on the question of whether, once acquired, an entitlement to vacation compensation can pass to the community of heirs and thus become part of the estate as per Section 1922 Subsection 1 BGB.

Before abandoning the so-called surrogate theory, the 9th Senate had denied inheritability, and recognized this solely for a claim for damages (see BAG dated 19.11.1996 – 9 AZR 376/95). In a decision in 2011, the 9th Senate had however left the question open (BAG dated 20.9.2011 – 9 AZR 406/11).

Abandonment of the surrogate theory

The BAG now established that, once acquired, an entitlement to compensation for vacation is inheritable. In this respect, the BAG ultimately upheld the legal action of the community of heirs. Because it could no longer abide by its earlier case law due to the complete abandonment of the surrogate theory.

ECJ: inheritable claim to compensation, even if the employment relationship ends through death

The question of whether, upon the death of an employee, an entitlement to vacation from the current employment relationship is converted into a compensation claim to which the heirs are entitled, has now also been decided. The ECJ answered this question in the affirmative in 2014 (ECJ dated 12.6.2014 – Rs. C-118/13 [Bollacke]). In appeal proceedings currently pending (9 AZR 45/16), the BAG will shortly have the opportunity of giving up its previously deviating case law (BAG, 12.3.2013 – 9 AZR 532/11).

Summary: Claims to compensation for vacation are inheritable. If an employee has residual vacation at the time of his death, his heirs inherit a corresponding claim to compensation.

Reconciliation of interests with list of names and temporary employees

LAG Cologne, judgment dated 20.7.2015 – 2 Sa 185/15 (final and absolute)

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If temporary employees are deployed at a permanent workplace, the presumption, to be derived from a reconciliation of interests with list of names, that the regular employee's workplace has lapsed and that there is no other possibility of employing him, can be refuted.

The defendant employer implemented a change in business operations in 2014 that resulted in several employees being served with notice of termination. The employer had previously agreed a corresponding reconciliation of interests with list of names with the works council. The list named those employees that were to be terminated for operational reasons – including the plaintiff. Through his legal action, the plaintiff contested the ordinary termination for operational reasons, served on him on June 25, 2014. He claimed that the termination was ineffective as a result of a grossly incorrect social selection. In addition, the employer permanently deployed temporary staff in the company.

Presumption effect of the list of names

As per Section 1 Subsection 5 KSchG (Law on Protection against Dismissal), the law presumes that urgent operational reasons are given for termination if the employee terminated is included in the list of names for a reconciliation of interests. The presumption effect also extends to the non-existence of alternative employment possibilities in the company. Furthermore, in the case of a list of names, the court can only check the social selection in terms of gross incorrectness.

Refutal of the operational reasons as a result of the use of temporary employees

The LAG (State Labor Court) Cologne considered the termination to be ineffective. The permanent use of temporary staff refutes the presumption that the possibility of employment for the regular employee has lapsed. The employer should have freed up one of the permanent workplaces at which temporary staff were deployed, and offered this to the plaintiff.

No facilitated burden of evidence concerning social selection

In addition, the statutory presumption effect of Section 1 Subsection 5 KSchG does not release the employer from the obligation to explain the social selection in detail, if the employee disputes its correctness in substantiated manner during the proceedings. The employer is also required to provide information on the social selection carried out, the criteria applied for this as well as on their weighting, if the employee is included in the list of names for the reconciliation of interests. The uncommented submission of

the list of names is not sufficient in this respect. If the employer fails to comply with his obligation to provide information, it can be implied that the social selection was grossly incorrect.

Summary: The reconciliation of interests should state explicitly which plans exist as regards the temporary employees deployed in the company. If temporary employees are deployed in permanent positions, their use must be ended. The workplace freed up as a result must then be offered to the regular employee who would otherwise be dismissed. If several employees are to be dismissed, a social selection must be made among these. The permanent position must be offered to the employee most deserving of social protection.

Pensioner companies under the BetrAVG (Company Pensions Act)

BAG, judgment dated 15.9.2015 – 3 AZR 839/13

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If a so-called pensioner company is created by means of a previously operative company transferring its business to a third party, and if the pensioner company is then released from adjustment of company pensions in accordance with Section 16 Subsection 1 BetrVG (Works Council Formation Act), this can, in exceptional cases, result in a claim for damages on the part of the company pensioners under Section 826 BGB (German Civil Code), aimed at the adjustment of the company pensions.

The Federal Labor Court was required to concern itself with the question of which claims a company pensioner can be entitled to, if a previously operative company becomes a so-called "pensioner company" through the sale of its business operations, i.e. no longer has any active employees but rather only services company pensioners. The plaintiff company pensioner was demanding an adjustment of his company pension in accordance with Section 16 BetrAVG (Company Pensions Act) to take account of inflation since the start of the pension. The defendant pensioner company (the pension debtor) invoked the fact that the adjustment had rightly not been made due to its poor economic position, and that the economic situation of other (group) companies was not decisive.

Change in case law

The Federal Labor Court initially specified its case law on prima facie liability. While it could be taken from the previous case law of the BAG (Federal Labor Court) that the appearance that an employer, obliged to adjust company pensions, will align the checking of the economic situation not only to his own position, but (also) to that of a third party (e.g. another group company), could also be triggered by the third party, the Federal Labor Court has now decided that this is not compatible with the principles of prima facie liability. The estoppel must be set by the pension debtor itself.

Inapplicability of Section 242 BGB in the context of Section 16 Subsection 1 BGB

A result, arrived at in application of Section 16 Subsection 1 BetrAVG, under which a pension debtor can invoke insufficient ability to pay, cannot be altered through application of the principle of good faith (Section 242 BGB). If, under Section 242 BGB, the pension debtor were unable to invoke an economic situation

not sufficient to permit an adjustment, the purpose of Section 16 Subsection 1 BGB (retention of assets) would be circumvented.

Accrual following the creation of a pensioner company

The pensioner company resulting from sale of the business operations must not be equipped with sufficient financial resources to enable future pension adjustments. The principles, developed by the Federal Labor Court, on damage claims of the company pensioner under Sections 280 Subsection 1, 241 Subsection 2, 31, 278 BGB in cases of insufficient capitalization of a pensioner company, concern only the pensioner companies, created by way of spin-off under the Law on the Transformation of Companies, to which pension liabilities are transferred. They are not applicable to a pensioner company, created through transfer of its operative business to a third party.

Basis of liability in the event of sale of the operative business

In these cases, a claim against the original pension debtor can result under Section 826 BGB (intentional unethical damage), if the overall character of the constellation created violates the feeling of common decency of all reasonably and just thinking persons. In this context, consideration must be given in particular to the reason for the sale of the company, and to whether the pension debtor has received a (market-oriented) counter-performance for the operative business sold by it. This must be considered in particular in cases of intra-group transfer of the operative business from one company to another.

Summary: The judgment summarizes the current case law of the BAG on the adjustment of company pensions in a group. With group matters, the possibility will have to be reckoned with in future of damage claims under Section 826 BGB frequently also being asserted, in addition to legal action for the adjustment of company pensions as per Section 16 BetrAVG. Depending on the submission of the plaintiff company pensioner, employers will have to reckon with the possibility of then having to demonstrate the economic justification of business or company sales – or even of other contract constructions between group companies – in the proceedings.

Smoking breaks not company practice

LAG Nuremberg, judgments dated 5.8.2015 – 2 Sa 132/15 and 5.11.2015 – 5 Sa 58/15 (final and absolute)

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Employees who are allowed to leave their place of work to smoke without the employer knowing the precise frequency and duration of the respective breaks – but which the employer remunerates nevertheless – cannot trust in this always remaining this way. No entitlement to remuneration is created through company practice.

Legal action was filed by a smoker employee who has been employed by the defendant since May 1995. Over a period of many years, the practice had established itself in the defendant's company of employees being allowed to leave their place of work to smoke, without having to clock in or out. Accordingly, the defendant did not deduct any wages for these breaks. Following several company directives on the protection of non-smokers, the "Works Agreement on Smoking in the Company" came into force on January 1, 2013. Among other things, this introduced an obligation to clock out and back in again when leaving the place of work to smoke – using the nearest time recording device and for the duration of the smoking break. After the defendant had deducted a total of 878 minutes from the plaintiff's working time for smoking breaks in the period January to March 2013 and not remunerated these, the latter filed legal action for remuneration of the resulting losses, invoking the principle of company practice. After all, he had been able to deduce from the defendant's conduct that the smoking breaks would also continue to be paid in future. He had not been deducted any wages prior to January 2013. Rather, the defendant had approved smoking breaks through continued payment of the remuneration. The works agreement that took effect as from January 2013 had not effectively altered the employment-contract claim based on company practice.

The LAG (State Labor Court) Nuremberg denied a claim based on company practice. The defendant's employees knew that the employer had no clear picture of the frequency and duration of the smoking breaks taken by the individual employees up to the coming into force of the "Works Agreement Smoking", and would therefore have difficulty in objecting to the duration and frequency, or would hardly be able to produce corresponding evidence in the event of deductions from wages. If there is a lack of sufficient knowledge of company practice and if this is recognizable to the employees, it is not possible to assume a

No sufficiently specified offer by the defendant due to lack of knowledge on the frequency and duration of the smoking breaks

No trust of the employees, deserving of protection, in future approval of paid smoking breaks

sufficiently specified offer by the employer. Given the significant scope of the arbitrary smoking breaks of between 60 and 80 minutes per day (!), no employee could trust in the defendant's willingness to continue paying remuneration in future for such a long time of not working. In the opinion of the LAG Nuremberg, payment of the smoking breaks is, in particular, in no way related to the actual work performance to be remunerated. On the contrary, the plaintiff was demanding payment for not working. However, in the absence of any other statutory, collective-agreement or contractual legal basis, very special points of reference are required in order to create trust, deserving of protection, among the smokers, without being paid any counter-performance. Furthermore, smokers could likewise not trust in continuation of payment for the smoking breaks, as this would result in obvious unequal treatment of non-smokers. Because these would have to work an average of over 10 percent more than their smoker colleagues for the same remuneration, a fact that is easily recognizable for the latter.

Against this background, the plaintiff was not entitled to assume that this unequal situation would be retained in future, or that no wage deduction would be made for smoking breaks in future.

Summary: The decision of the LAG Nuremberg makes it clear that non-regulated smoking breaks do not create an entitlement based on company practice. Employees certainly cannot conclude that continued payment of remuneration by the employer over several years, without knowing the precise duration and frequency of the respective breaks, means the employer will continue this practice in future.

Right of co-determination when prohibiting private use of mobile phones during working hours

Munich Labor Court, ruling dated 18.11.2015 – 9 BVGa 52/15

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The ban on the use of mobile telephones for private purposes during working hours or the instruction to have any use approved by a superior, concerns the orderly conduct of employees and thus triggers a co-determination right of the works council.

The petitioner was the works council formed in the respondent's organization. The respondent sent an email instruction to all employees at its Munich site, prohibiting the use of personal mobile telephones for private purposes during working hours and stating that any use of mobile telephones, whether for company or private purposes, required the prior approval of a superior. The prior consent of the works council to this ban on mobile telephones was not obtained.

The Munich Labor Court saw the arbitrary conduct of the respondent as disregard for the co-determination rights of the works council. The ban on the use of private mobile telephones during working hours or the instruction to have all use – for private or company purposes – approved by a superior, concerns the company order and the conduct of employees in the company, and is therefore subject to co-determination in accordance with Section 87 Subsection 1 No. 1 BetrVG (Works Council Formation Act). A reference to company order is given merely on the basis of the fact that other employees could be disturbed by the private use of mobile telephones at the place of work.

Company order fundamentally affected

On the other hand, the co-determination-exempt work conduct of the employees is not generally affected by a ban on mobile telephones. It is the duty of the employee to perform his/her work in concentrated manner, quickly and free from errors. Nevertheless, there are many conceivable situations in which private use of a mobile telephone is compatible with proper performance of work. A short glance at the mobile telephone to check for missed calls or text messages does not fundamentally prevent proper working. Rather, it can even be beneficial for the ability to concentrate on the work if an employee knows that he can be contacted at any time by children or persons requiring care. The Munich Labor Court also refers to a decision of the BAG (Federal Labor Court) in 1986, in which the BAG took the view that the playing of music (the specific case involved listening to the radio) – something that is also no problem today with

Work conduct fundamentally not affected

mobile telephones – does not necessarily hinder proper work (BAG dated 14.1.1986, File ref.: 1 ABR 75/83).

Not every ban on mobile phones subject to co-determination

In the opinion of the Munich Labor Court, the co-determination-exempt work conduct can only be affected by a general ban on mobile telephones if employees are, for example, in direct contact with customers during working hours (as in sales meetings) since, in these cases, the instruction has a direct effect on the work performance prescribed by the employer under its right to issue instructions (no listening to music, no reading of messages during a sales meeting). Here, a ban on mobile telephones could be issued without first hearing the works council.

Divergent case law

To date, the BAG has not had to concern itself with the question of whether prohibiting private use of mobile telephones during working hours is subject to mandatory co-determination of the works council. In 1999 (ruling dated 30.10.2009 – 6 TaBV 33/09), the LAG Rhineland Palatinate took the view that the works council has no right of co-determination in these cases. In the opinion of the LAG, direct impairment of the work performance through use of a mobile telephone cannot be excluded. In addition, passive listening to the radio during working hours – which the BAG was required to decide on (see above) – also differs clearly from active use of a mobile telephone.

Summary: Whether a general ban on private use of mobile phones during working hours is subject to mandatory co-determination of the works council has thus far not been conclusively clarified. An appeal has been lodged with the State Labor Court Munich against the decision of the Munich Labor Court (10 TaBVGa 18/15). As long as there is no clear line in case law, employers are well advised to reach a mutual ruling with the works council on any intended general ban on the private use of mobile telephones. This regularly also increases acceptance among the staff.

Employee contributions to reorganization measures and unemployment benefit

Work remuneration, waived by employees under a collective reorganization agreement, must not be taken into consideration as assessment remuneration when calculating unemployment benefit, even if the claim is revived in the event of insolvency of the employer.

BSG, judgment dated 11.6.2015 – B 11 AL 13/14 R

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Facts

The plaintiff worked for S GmbH as flat screen printer. S GmbH and the trade union V concluded a collective reorganization agreement to apply in the period from July 1, 2009 to December 31, 2013, to avoid an existence-threatening situation. This provided for the employees waiving remuneration components and the employer refraining from dismissals for operational reasons. The waiving of remuneration was subject to the condition subsequent of S GmbH not submitting an application for insolvency during the term of the collective agreement. Insolvency proceedings for S GmbH were opened at the beginning of 2011. The insolvency administrator dismissed the plaintiff for operational reasons. The Federal Labor Office approved unemployment benefit for the plaintiff. The remuneration components waived by the plaintiff were not taken into consideration when calculating the level of the unemployment benefit. The plaintiff therefore considered the benefit notification to be unlawful. While the previous instances upheld his legal action for higher unemployment benefit, the Federal Social Court (BSG) set these decisions aside and dismissed the legal action.

Calculation of unemployment benefit

The authoritative remuneration for assessment of the unemployment benefit is the respective average contributory work remuneration per day, achieved by the unemployed person during the assessment period. Due to fiction of law, work remuneration, to which the unemployed person was entitled at the time of leaving the employment relationship, is considered achieved if it (i) has been paid or (ii) has not been paid solely as a result of illiquidity of the employer. The revived wage parts, waived by the plaintiff, had not been received by the latter, but rather were registered under the schedule of creditor's claims. As such, they could only be taken into consideration if they were not received by the plaintiff solely as a result of the employer's illiquidity. In this respect – according to the BSG – the principle of monocausality applies. The illiquidity of the employer must be the sole cause of non-payment; it is not sufficient if the remuneration is not paid for other reasons and the illiquidity is merely an added reason.

Principal of monocausality

Here, the cause of non-payment was the plaintiff's waiving of remuneration on the basis of the collective reorganization agreement, during a period in which S GmbH was still solvent. The employer's illiquidity did not occur in addition until later.

No passing on of the reorganization risk

In the opinion of the BSG, the reorganization risk must not be passed on to the social community. The possibility of the parties to an employment relationship retrospectively and amicably agreeing higher work remuneration, with the aim of obtaining higher unemployment benefit without the employer being required to pay the employee a higher amount and to (retrospectively) pay contributions on this, should be prevented.

Contributions to reorganization more difficult

Most collective reorganization agreements include so-called "reversionary clauses", under which waiving of remuneration lapses retrospectively upon submission of an application for insolvency. This is intended to protect employees against failure of the reorganization efforts. However, this goal is increasingly no longer achieved, as now confirmed by the present decision from the perspective of social insurance law. Even under insolvency law, revived claims to remuneration are only simple insolvency claims, not insolvency-asset debts. This is designed to satisfy the principle of equal treatment of creditors.

In reorganization practice, the question arises of how the employee contributions to reorganization can be protected if necessary. Employer guarantees are highly likely to be voidable, third-party guarantees cost money that is typically not available in this situation. In future therefore, the sole counter-performance for the waiving of remuneration will be the temporary exclusion of dismissals.

Summary: With reorganization, relief through salary waiving is frequently the only alternative. Without this, insolvency occurs earlier. With insolvency benefit, it is a recognized fact that, following conditional waiving of remuneration and the occurrence of insolvency, the remuneration claims are revived and replaced by insolvency benefit. It remains to be hoped that the lawmaker will see the problem of employee contributions to the reorganization of an ailing company and their effects on assessment of unemployment benefit, and will make corresponding adjustments.

Temporary employees and co-determination in the company

BAG, ruling dated 4.11.2015, 7 ABR 42/13

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Under the provisions of the MitbestG (Co-Determination Act), the employees of a company/group elect their Supervisory Board representatives either directly or via delegates – depending on the total number of employees.

German labor law contains a host of threshold levels, where the rights of the works council, the size of bodies or election procedures depend on the number of employees. In (almost) every case, express reference is made to Section 5 BetrVG (Works Council Formation Act) in terms of the definition of the employees to be counted. The MitbestG also stipulates that the election procedure (via delegates or direct) also depends on the number of employees.

Employees as defined by law are employees

Section 5 BetrVG defines "employees within the meaning of this law" as "workers and salaried staff…". Historically, the view was always taken that these must be employees of the respective company affected, i.e. an existing employment relationship with the company was postulated.

Change of mood

The success of temporary employment called this view into question. The 2001 amendment to the BetrVG expressly introduced the right to vote (not however the right to stand for election). On March 13, 2013, the BAG (Federal Labor Court) abandoned the requirement of a contractual relationship between employee and employer. It subsequently postulated that – particularly with regard to threshold levels – the term employee in Section 5 BetrVG was to be interpreted in standard-purposeful manner.

Consequence

It also maintains this line in the ruling dated November 4, 2015, and now also includes temporary employees in the calculation of the staff under the MitbestG. Since, under Section 7 Sentence 2 BetrVG – they also have the right to vote, this is only logical.

Summary: The decision is a continuation of the new line adopted by the BAG since 2013, and simultaneously an anticipation of the legislative decision. The latest draft of the AÜG (Law on Temporary Employment) is supposed to expressly regulate consideration of temporary workers with the known threshold levels.

Ticker
Employment Law

In the newly introduced "Ticker" section, the Practice Group Employment Law provides information on new and practically relevant developments in the field of employment law. From an employment-law perspective, 2016 has already been an eventful year. For this reason, we wish to use the following pages to inform you of the relevant changes to the law in recent months.

Amendment to the Law on Temporary Employment (AÜG) in the legislative process

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Under the latest draft bill, the same temporary employee can be deployed in the hiring firm for a maximum of 18 months. The previously applicable open term "temporary" would therefore yield to a more legally secure ruling. Renewed deployment of the same employee is only possible after an interruption of at least six months, unless otherwise regulated by a collective agreement in the company of deployment, or if a works agreement makes reference to any such collective agreement.

At the latest after a deployment of nine months, the temporary employee must be paid the same as a regular employee of the hirer. A collective agreement can extend this phase to 15 months if it gradually increases the temporary employee's wage to the level of the regular employees. This ruling removes much of the financial incentive of temporary work.

The intention is to introduce a ban on the use of temporary employees in struck companies that is punishable by fine. The ban should cover both the use of new temporary employees as strikebreakers as well as the continued use of existing temporary employees.

In future, the term hiring out of temporary staff must be expressly used, both in the agreement between the party hiring and the party hiring out as well as with respect to the temporary employees concerned. Violation of the duty to disclose will render the temporary employee's employment contract invalid, and will create an employment relationship with the hirer.

Finally, the draft legislation also envisages a ban on so-called chain hiring, i.e. the hiring out of temporary staff must always be solely by the temporary worker's employer itself. Nevertheless, violation of the ban on chain hiring does not create an employment relationship between the temporary employee and the final hirer, but rather (only) constitutes an administrative offense for the party hiring out and the hirer.

The draft legislation also states that in future temporary staff must be taken into consideration concerning threshold levels under the co-determination laws (Law on One-Third Participation, Co-Determination Act and Law on Co-Determination in the Iron and Steel Industry). This is likely to favor transformation to company forms not covered by these laws (e.g. the SE).

The newly added Section 611a BGB (German Civil Code) standardizes the definition of employee developed by case law. Nevertheless, the latest draft no longer includes the criteria originally planned for the delimitation of contracts of employment and contracts for work and services.

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 on our Practice Group Employment Law.

Lectures

Dr. Johan-Michel Menke, LL.M. had spoken during the seminar "Employment Law in Sport", organized by the Deutsche Anwaltsinstitut e.V. in Heusenstamm on April 15, 2016, among others together with Anna Lisa Rissel, In-House Counsel and Director Legal, Personnel and Institutional Relations at FC Bayern München AG.

On April 21, 2016, **Dr. Holger Lüders** had spoken for the Beck Academy in Munich on the subject "Optimum Formulation of Employment Contracts".

On April 30, 2016, **Prof. Martin Reufels** had spoken for the Deutsche Anwalt Akademie in Düsseldorf on the subject "Litigation Tactics in Employment Law".

Bernd Weller had organized a seminar on May 19, 2016 at our Frankfurt office on the subject "Spotlight: Employment of Foreigners".

On June 2 and 3, 2016, **Bernd Weller** will be speaking at the Summer School Works Council Formation Act for the Beck Academy in Frankfurt am Main.

Astrid Wellhöner and **Bernd Weller** will be speaking at the Summer School Employment Law for the Beck Academy in Munich from July 13 through 15, 2016.

On November 24, 2016, **Dr. Holger Lüders** will speak for the Beck Academy in Frankfurt on the subject "Optimum Formulation of Employment Contracts".

Publications

Prof. Martin Reufels has published "Litigation Tactics in Employment Law", 3rd Edition Nomos Verlag.

Bernd Weller has discussed the BAG ruling dated 29.4.2015 (7 ABR 102/12) on the works council communication representatives in the AuA (Work and Employment Law) magazine (2016, 55).

Prof. Martin Reufels has published the article "Confidentiality in Employment Relationships (Reufels/Pier)" in the ArbRB magazine (2016, 57 et seq.).

Dr. Johan-Michel Menke, LL.M. has published the article "Violation of a post-contractual prohibition to compete through continuation of a formation loan to a competitor company" in the EWiR magazine (2016, page 29).

Dr. Johan-Michel Menke, LL.M. and Dr. Thomas Schulz, LL.M. have published the article "Berlin Labor Court: The entitlement of a professional player to employment in professional soccer" in the "Betriebs-Berater" magazine (Issue 14/2016).

Dr. Sascha Schewiola has published the article "Claim of an employer to damages against an airline company for delays" in the "Arbeitsrechtsberater 2016" magazine.

Dr. Wilhelm Moll, LL.M. (Berkeley) has published "The collective agreement – manual of the entire law of collective bargaining" (Otto-Schmidt-Verlag, 2nd Edition 2016) together with Prof. Dr. Martin Henssler and Prof. Klaus Bepler as well as **Dr. Alexander Bork** and **Christoph Hexel** as co-authors. Dr. Wilhelm Moll was the author of the chapter on collective reorganization agreements.

People

Lawyer **Dr. Stefan Greif** joined our Cologne employment-law team in November 2015 to strengthen the department headed by Dr. Wilhelm Moll. In this role, he advises and represents clients in all matters of individual and collective employment-law. Before joining our partnership, Dr. Greif spent several years dealing with employment-law problems from a research perspective, initially as research assistant in the Professorship for German and European Employment Law at the Ruhr University in Bochum, and later as research assistant at the Institute for Employment and Social Law of the Westphalian Wilhelms University Münster. This has enabled Dr. Greif to acquire particular expertise in matters of European employment law.

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Lawyer **Janette Zillinger** joined the Practice Group Employment Law at the Chemnitz office of Heuking Kühn Lüer Wojtek in January 2016. Here, she supports the department headed by Lawyer Annemarie Rott as well as Lawyer Veit Pässler, and focuses on advising national and international companies on all matters related to service and employment contracts. Janette Zillinger studied at the Johann-Wolfgang-Goethe University Frankfurt/Main. She completed her legal clerkship at the Regional Court Darmstadt. Among other things, she worked for a law firm in Hanau specializing in SME's during this time.

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This Newsletter does not contain legal advice. The information contained in this Newsletter is the result of thorough research; nevertheless, it presents case law and legal developments in extract form only and is no substitute for individual advice tailored to the particular aspects of the respective individual case.

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