Luther.

Employment Law Newsletter

Issue 2 2025

unyer GLOBAL ADVISORS

Content

Legal information
Published by: Luther Rechtsanwaltsgesellschaft mbH
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EDITORIAL

Dear readers,

Summer has Germany in its grip and many are waiting for the holiday season, which promises a well-deserved break from everyday working life. Nevertheless, there is no standstill in labour law, so no break for our newsletter either, even in record temperatures.

Recently, things have been particularly heated on the subject of the minimum wage within the new federal government. The development of the minimum wage in Germany is one of the central labour policy issues in the coalition agreement between the CDU/CSU and SPD – there were only discrepancies over the "how". In our main article, Paul Schreiner and Stephan Sura from Luther's Cologne office present the new government's main plans for labour law and attempt to assess the possible outcomes. Meanwhile, the amendments to the Maternity Protection Act were passed during the last legislative period and came into force in June. Our Dusseldorf colleagues Eva Rütz and Jana Voigt show the key aspects of the reform and highlight its strengths and weaknesses.

In our recently introduced "bAV Aktuell" section, in which we provide information on the most important news from the field of company pension schemes, Jan Hansen from Cologne reports on a judgement by the Federal Labour Court (BAG), according to which deferred compensation can also be excluded by older collective agreements. This time, our look outside the box in our Unyer network takes us back to Austria: Anna Mertinz and Stefan Burischek from our partner law firm KWR explain the details of the implementation of the European Accessibility Act there.

As usual, you will also find what we consider to be the most important recent court decisions, accompanied by practical tips from our experts and flanked by further judgements and decisions in our "Case law in brief" section.

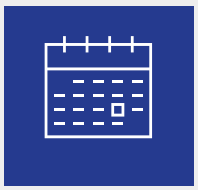
We hope our potpourri of topics will arouse your curiosity. Feedback and questions are always welcome – feel free to contact us.

We wish you a great summer!

Yours

Achim Braner

Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

■ MAIN TOPIC

The employment law agenda of the new federal government

Employment policies are not the main focus of the new federal government in Germany, but the coalition agreement between the CDU/CSU and SPD nevertheless does contain a number of them. Meanwhile, the issue of minimum wage seems to be sparking new discussions. An overview of the most important plans.

I. Statutory minimum wage

The statutory minimum wage became a big employment policy issue immediately after the coalition agreement was published at the beginning of April – yet again. Since 1 January 2025, the federal minimum wage has stood at EUR 12.82 per working hour. The new coalition agreement states that a "strong and independent Minimum Wage Commission will be retained" – which should not really be worth mentioning, as the German Minimum Wage Act (Mindestlohngesetz / MiLoG) already stipulates that the commission is solely responsible for proposing adjustments. However, it is then explained that the Commission will base the further development of the minimum wage as part of an overall assessment both on the development of collective agreements in Germany and on 60 % of the gross median wage of full-time employees. In this way, a minimum wage of EUR 15.00 "is achievable in 2026". Even before the coalition agreement was signed, there were apparently differences of opinion between the CDU/CSU and SPD as to what this meant. The MiLoG also stipulates that the Minimum Wage Commission must orientate itself to the development of collective bargaining. Meanwhile, the requirement to align with 60 % of the gross median wage stems from the EU Minimum Wage Directive 2022/2041 which was actually supposed to be implemented by 15 November 2024. However, at the beginning of this year, ECJ Advocate General Emiliou claimed in proceedings brought by Denmark and Sweden that the directive should be declared null and void because the EU is not responsible for aspects of wage setting. The ECJ's decision will probably be handed down this year.

A sole orientation towards 60 % of the national gross median wage would in fact lead to a minimum wage of EUR 15.00. A further increase bypassing the Commission or even an amendment to the MiLoG will not take place with the Union, although the implementation of the 60 % criterion has already taken place elsewhere: Chaired by Christiane Schönefeld, former member of the Executive Board of the Federal Employment Agency, who already made her own adjustment proposal for increasing the minimum wage in the summer of 2023 and pushed it through with her vote, the Minimum Wage Commission gave itself new rules of procedure at the beginning of 2025, in which it stipulated that in future it would also be guided by the reference value of 60 % of the gross median wage of full-time employees in accordance with the EU Minimum Wage Directive – although the MiLoG does not mention this criterion. At the end of June 2025, the Minimum Wage Commission recommended an increase to EUR 13.90 on 1 January 2026 and to EUR 14.60 on 1 January 2027 – meaning that the threshold of 15 EUR will probably not be exceeded until 2028 via the regular route.

II. Compliance with tariffs

The coalition is endeavouring to increase collective bargaining coverage. To strengthen this, a Federal Collective Bargaining Act should be introduced, which will apply to contracts at federal level from EUR 50,000.00 and for start-ups "with innovative services" from EUR 100,000.00 in the first four years after their foundation. Obligations to provide evidence, controls and bureaucracy should be kept to an absolute minimum. It remains unclear what is meant in terms of content.

III. Working hours

In 2019, the ECJ stated in its CCOO-decision that employers are obliged to set up a system to measure the daily working hours worked by employees. The Federal German Labour Court (Bundesarbeitsgericht / BAG) subsequently ruled in autumn 2022 that employers are obliged to record the start and end of daily working hours already in accordance with Sec. 3 (2) No. 1 Work Protection Act (Arbeitsschutzgesetz / ArbSchG) (BAG, decision of 13 September 2022 – 1 ABR

22/21). Because employees and companies want more flexibility according to the coalition agreement, the CDU/CSU and SPD want to create the possibility of weekly instead of daily maximum working hours “in line with the European Working Time Directive” and in dialogue with the social partners. The obligation to record working hours electronically should be regulated in an unbureaucratic manner and appropriate transitional rules should be provided for small and medium-sized enterprises.

Indeed, Sec. 3 Sentence 1 German Working Time Act (Arbeitszeitgesetz / ArbZG) stipulates a basic maximum daily working time of eight hours, whereas the Working Time Directive 2003/88/EC only requires the definition of a maximum weekly working time. More problematic, however, is the addition in the coalition agreement that trust-based working time (“Vertrauensarbeitszeit”) should remain possible without time recording – i.e. apparently exempt from the recording obligation to the current extent. In view of the aforementioned case law, this can only mean that the obligation to keep records always applies if the employment relationship in question is not covered by an exemption. However, as there is no indication that such exemptions will be extended, this passage in the coalition agreement is likely to remain meaningless.

IV. Fixed-term employment law

The coalition wants to make it easier to return to the previous employer after reaching the standard retirement age by lifting the ban on previous employment (pursuant to Sec. 14 (2) Sentence 2 Part-Time and Fixed-Term Act – Teilzeit- und Befristungsgesetz / TzBfG) and thus enabling employees to continue working for a fixed term. To this end, a provision is to be created in the TzBfG that exempts employment relationships during studies from the ban on continued employment.

V. Collective employment law

The right framework should be set for the increasing challenges of digitalisation and AI in the world of work so that these can be resolved in a social partnership. (Company) co-determination should therefore be further developed – presumably in this context. However, the coalition agreement does not provide any concrete details here either. Online works council meetings and online works meetings should be made possible as an alternative to face-to-face formats. The option to vote online is also to be enshrined in the Works Constitution Act (Betriebsverfassungsgesetz / BetrVG) – this presumably refers to works council elections. In addition, the right of trade unions to access the company should be extended to include digital access, which corresponds to their analogue rights. What exactly this means is not explained. Trade union membership is also to be made more attractive in future through tax incentives for members. No mention is made of the related issues of constitutional law.

VI. Equality

The coalition is planning a cross-departmental equality strategy, the aim is to realise equal pay for equal work by 2030. The EU Transparency Directive should be implemented with minimal bureaucracy. Structural disadvantages for women in everyday life should be eliminated and it is to be ensured that unpaid work such as childcare and care is distributed more fairly. In addition, the legal regulations for women in management positions are to be improved – “where there is under-representation”. Violations of targets - whether due to a lack of targets, deadlines or insufficient justification for a target of “zero” – are to be consistently and tangibly penalised in future. This plan is probably aimed at all companies that are subject to such regulations.

VII. Shortage of skilled labour

Because Germany needs skilled immigration in particular, a digital agency for skilled labour immigration ("work-and-stay agency") should be created as a single point of contact for foreign skilled workers. The agency should also speed up the recognition of professional and academic qualifications. The aim is to have a standardised recognition procedure involving employers within eight weeks. People from third countries who have successfully completed a training or a degree programme should be able to stay and work in Germany. It should be made easier for refugees to take up employment, above all by reducing work bans to a maximum of three months. Asylum seekers from safe countries of origin, Dublin cases or people who are clearly abusing the right of asylum are exempt.

VIII. Other

Supplements for overtime that exceed the collectively agreed full-time working hours should be exempt from tax. A minimum working week of 34 hours is to be regarded as full-time work for collectively agreed working hours, and 40 hours for working hours that are not collectively agreed. If employers pay a bonus to part-time employees to extend their working hours, this should also be tax-favoured. In addition, the coalition wants to strengthen company pension schemes and promote their expansion, particularly in small and medium-sized companies and among low earners. In this context, the portability of a pension scheme should be increased in the event of a change of employer. The effectiveness of occupational health and safety instruments should be examined with regard to mental illness. Correspondingly, occupational integration management is to be publicised, particularly in small and medium-sized companies. Working conditions in the courier and parcel service sector are to be improved, particularly through the introduction of subcontractor liability. A European social security card will be supported, and the posting of workers in the EU is to be made technically easier by reforming the eDeclaration. The aim is to bundle the eDeclaration with the A1 procedure. In addition, telephone sick notes should be modified to prevent abuse, e. g. by excluding online sick notes via private internet platforms.

IX. Conclusion

Overall, the coalition agreement is still characterised by the election campaign in many areas, and it has clearly not been possible to fully resolve outstanding points of contention, such as the issues of trust-based working hours and collective bargaining. It is to be hoped that these deficits will quickly disappear in everyday government life or that pragmatic solutions will be found. The economic situation of companies and employees would require this – not just when it comes to minimum wage.

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■ INDIVIDUAL TOPICS

New developments in maternity protection law

At the beginning of June, amendments to the Maternity Protection Act (Mutterschutzgesetz / MuSchG) came into force. The new provisions significantly strengthen the protection of expectant mothers.

I. Definition of childbirth

The provisions of the MuSchG on the protection of expectant or young mothers are based largely on the concept of childbirth. The definition of this term has always been controversial. According to established case law of the BAG, childbirth is deemed to have taken place in the case of a live birth, i. e. when the child's heart is beating after separation from the womb, the umbilical cord is pulsating or lung respiration has begun (based on Sec. 31 (1) of the Civil Status Ordinance (Personenstandsverordnung / PStV) in conjunction with Sec. 21 (2) of the Civil Status Act (Personenstandsgesetz / PStG)). In addition, childbirth was affirmed in the case of so-called stillbirths if the child weighed at least 500 grams or had reached the 24th week of pregnancy. In all other cases, the term miscarriage was used. The central point of the amendment is the addition of the definition of childbirth in Sec. 2 (6) MuSchG and the fundamental equal treatment of miscarriages from the 13th week of pregnancy, so that the protection against dismissal under the MuSchG will also extend to these cases in future.

II. Graduated maternity protection periods

However, the legislator is only pursuing this equal treatment with regard to maternity protection periods to a limited extent and now provides for a staggered arrangement in Sec. 3 (5) MuSchG. In the event of a miscarriage from the 13th week of pregnancy, the period is two weeks, from the 17th week of pregnancy six weeks and from the 20th week of pregnancy eight weeks. The provisions on postnatal maternity protection are mandatory, i. e. it is not possible to waive them. If an employer employs women contrary to postnatal maternity protection, they commit an administrative offence punishable by a fine of up to EUR 30,000.00 under Sec. 32 (2) MuSchG. In the event of a miscarriage after the 13th week, there is also a ban on employment. However, a woman may then expressly request to continue working in accordance with Sec. 3 (5)

Sentence 1 MuSchG. In this case, the employer is not acting unlawfully. At the same time, the woman may revoke her request at any time.

III. Extended maternity leave only for live births

Furthermore, the legislator has added a new sentence 5 to Sec. 3 (2) MuSchG. According to this, the extended maternity leave periods of twelve weeks instead of eight weeks after childbirth in the event of premature birth, multiple births or if a disability of the child is medically diagnosed within eight weeks of childbirth do not apply in the event of a stillbirth.

The reason for this is that in these cases, not only is there increased physical and psychological stress for the woman concerned, but also increased care requirements for the child or children.

IV. No obligation to take a pregnancy test in the event of dismissal

Parallel to the amendment to the MuSchG, the BAG recently issued a key ruling on maternity law (BAG, decision of 3 April 2025 – 2 AZR 156/24). In the case in question, the employment relationship of the plaintiff was terminated on 14 May 2022. On 29 May 2022, she then tested positive for pregnancy. She informed the defendant employer of this by email on the same day, but did not receive an appointment with her gynaecologist until 17 June 2022. On 13 June 2022, she filed an action for unfair dismissal, alongside an application for subsequent admission. A medical certificate subsequently submitted confirmed that she was approximately 7+1 weeks pregnant. According to this, the pregnancy began

on 28 April 2022. The Labour Court and the Higher Labour Court allowed the action to proceed.

The BAG found that the plaintiff had missed the deadline for filing an action for unfair dismissal. If the dismissal requires the approval of an authority and the period for filing an action only begins with the announcement of the official decision pursuant to Sec. 4 Sentence 4 Protection against Dismissal Act (Kündigungsschutzgesetz / KSchG), this provision must nevertheless be reduced teleologically. In the case of pregnancy, it only applies if the employer is aware of it. Otherwise, the period begins to run upon receipt of the termination. However, an affected employee can then apply for reinstatement in her previous position pursuant to Sec. 5 (1) Sentence 2 KSchG. The 'removal of the obstacle' within the meaning of Section 5 (3) Sentence 1 KSchG (= lack of knowledge of the pregnancy) only occurs upon medical confirmation of the pregnancy. This applies in any case if the employee endeavours to obtain an appointment at an early date. Furthermore, upon receipt of a notice of termination, there is no obligation to immediately carry out a pregnancy test, even if there are indications that this may be necessary. Sufficient information pursuant to Section 17 (1) Sentence 1 MuSchG is deemed to have been provided if the affected party informs the employer immediately after becoming aware of the pregnancy. For employers, the decision means that not only must the receipt of the termination be documented in a verifiable manner, but also the communication in the employment relationship as a whole.

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Unilateral offsetting of time credits from different working time accounts

Provisions on the unilateral offsetting of time credits from different working time accounts within the framework of a works agreement are not per se inadmissible, but must comply with the requirements of a collective agreement in the case of an employer bound by such.

BAG, decision of 4 December 2024 – 5 AZR 277/23

The case

The parties are in dispute about the amount of time credits. The plaintiff is employed as a control centre dispatcher at an airport fire brigade. His employment relationship is governed by the collective agreement for the public service for the airport service sector (TVöD-F) and a company collective agreement for fire brigade and medical personnel (TV Feuerwehrpersonal). The shifts owed or worked in accordance with the collective labour agreement for fire service personnel are recorded in a so-called debit account. The TVöD-F contains regulations on the compensation period and a possible extension of the same. The company also had a company agreement on the organisation of working hours (BV Arbeitszeit). According to this agreement, hours worked in addition to the shifts were credited to a separate hours account. As soon as 16 hours had accumulated in this hours account, a shift could be deducted from the target account.

According to the company agreement, the hours account is also to be balanced when an employee leaves the company and the balances are to be automatically carried forward to the following year on 31 December. At the end of each year, the defendant offset time credits from the hours account

against minus hours in the debit account without the plaintiff's consent. The plaintiff subsequently applied for a declaratory judgement that offsetting could only take place with his consent and that his hours account had an unreduced time credit. The Labour Court (Arbeitsgericht / ArbG) dismissed the claim, the Higher Labour Court (Landesarbeitsgericht / LAG) of Cologne upheld it.

The decision

The BAG upheld the defendant's appeal as well. In a works agreement, a unilateral possibility of offsetting balances of different working time accounts could be regulated. However, the provisions in question were contrary to the collective agreement. According to Sec. 6 (2) Sentence 1 TVöD-F, a period of up to one year is to be used as the basis for calculating the average of the regular weekly working time. The relevant compensation period is therefore the respective calendar year. It is true that Sentence 2 of the provision permits an extension of this compensation period. However, the provisions of the BV Arbeitszeit would extend the compensation period here to the entire duration of the employment relationship, which would constitute a cancellation of the compensation period. In addition, the transfer of the balances to the following year leads to the creation of "savings accounts", which are to be measured against Sec. 10 TVöD-F and whose special, strict requirements are not met here.

Our comment

Nevertheless, the BAG considers the regulation of unilateral offsetting to be permissible in principle. The decision allows employers a certain degree of flexibility. For employers bound by collective agreements, however, caution must be exercised when concluding such regulations insofar as regulations in a works agreement are only possible if and whereas they relate to a subject matter not regulated by a collective agreement or if the applicable collective agreement contains an opening clause in this respect. Furthermore, care must be taken to ensure that the provisions made in the works agreement are compatible with the provisions of the collective agreement – otherwise the works agreement is wholly or at least partially invalid.

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No contestability of the works council election due to premature posting of an election proposal

If, when conducting a works council election in accordance with the simplified one-stage election procedure, the election committee announces the only election proposal before the statutory deadline for the submission of election proposals pursuant to Sec. 14a (3) Sentence 2 BetrVG has expired, this does not justify the contestability of the election.

BAG, decision of 27 November 2024 – 7 ABR 32/23

The case

The parties are in dispute about the validity of a works council election. The employer employs approx. 77 employees in its company. To initiate a new works council election, the election committee issued an election notice on 24 March 2022, according to which election proposals were to be submitted to the election committee by 6 May 2022 at the latest. The election committee announced the only election proposal submitted by posting it on the afternoon of 6 May 2022. The employer then applied to the Labour Court to declare the works council election invalid due to the premature announcement of the election proposal. The Labour Court and the Higher Labour Court granted the application.

The decision

The BAG overturned the decision and found that the works council election was not invalid because the election committee had already posted the election proposal it had

recognised as valid on the afternoon of 6 May 2022 and thus before the statutory minimum period for submitting election proposals had expired. The deadline applicable in the simplified single-stage election procedure in small companies, according to which election proposals can be submitted up to one week before the election (Sec. 14a (3) Sentence 2 BetrVG), is to be calculated as a so-called backward deadline analogous to Sec. 187 et seq. German Civil Code (Bürgerliches Gesetzbuch / BGB). After the expiry of this statutory minimum period, the election committee must publicise the valid election proposals by posting them (Sec. 36 (5) Sentence 3 Works Council Election Act – Wahlordnung / WO). Only this obligation to publicise constitutes an essential provision on the election procedure within the meaning of Sec. 19 (1) BetrVG, which entitles the works council election to be contested.

Nevertheless, this does not strictly prohibit the announcement before the deadline. This is also not contradicted by the fact that in the normal election procedure, the announcement must be made “at the latest” one week before the election (Sec. 10 (2) WO) and this wording is missing in the simplified election procedure. There is no reverse conclusion to the effect that an earlier announcement is prohibited in the simplified election procedure. The simplified election procedure is intended to facilitate the works council election in small companies. It would contradict this if stricter requirements regarding early announcement were to apply than in the normal procedure.

Our comment

The decision only concerns a specific issue in the context of the implementation of the simplified election procedure and provides legal clarification in this regard. At the same time, however, it also shows that despite the extremely detailed legal structure of the procedure for works council elections in the BetrVG and the WO, inconsistencies can still occur. The general statement that not every conceivable breach of formal election requirements makes a works council election contestable is significant for practice. This is to be welcomed, as it is almost impossible to conduct a works council election completely free of errors due to the extremely strict formal requirements.

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Compensation for damages due to late target setting

Targets for variable remuneration can only fulfil the associated motivational and incentive function if the targets are communicated to the employee in good time so that they can adjust their work performance accordingly. Failure to communicate them in good time may give rise to a claim for damages.

BAG, decision of 19 February 2025 – 10 AZR 57/24

The case

The employment contract of the plaintiff employee regulated an annual target salary, which consisted of a gross fixed salary and a variable performance-related remuneration. The variable remuneration was based on a company agreement according to which employees receive a target to be discussed in advance by 1 March of the calendar year, 70 % of which is made up of company targets and 30 % of which is made up of individual targets. For 2019, it was disputed between the plaintiff and his employer whether the parameters of the company targets relevant for the variable remuneration were communicated during a presentation in March 2019 or at a heads meeting in April 2019. In any case, the employee was given specific figures on the company targets on 15 October 2019, but no individual targets were set. The employer subsequently only paid out the variable remuneration on a pro rata basis, whereupon the plaintiff asserted a claim for damages. The Labour Court dismissed the claim, the plaintiff’s appeal at the Higher Labour Court was successful.

The decision

The BAG confirmed the decision of the Higher Labour Court and dismissed the defendant’s appeal. The defendant had culpably breached its duty to set targets in accordance with the provisions of the works agreement by not setting the employee any individual targets and only informing him of the company targets in a binding manner after around 3/4 of the target period had already expired. At this point in time, it was no longer possible to set targets that would fulfil their

motivational and incentive function. The employee was therefore entitled to compensation for lost performance-related variable remuneration for the 2019 calendar year. In contrast to target agreements, which are agreed, targets are set solely by the employer, who has a unilateral right to determine performance. Whether and, if applicable, by what date the employer must set a target is usually determined by the agreements between the parties or the collective labour law provisions applicable to the employment relationship. If a delayed target can no longer fulfil its motivational, incentive and control functions, impossibility arises. A subsequent determination of performance by the employer is then ruled out.

In any case, the setting of targets by means of a target agreement becomes impossible once the target period has expired. The BAG left open the question of whether the setting of targets becomes impossible solely because a deadline for the setting of targets set in a works agreement has passed. In the present case, the target setting had nevertheless not taken place in good time, as individual targets had not been set at all and the company targets for the current calendar year were not communicated until October. It was also irrelevant whether the key figures for the company targets had already been presented in the previous spring. This did not constitute a necessary declaration of intent, as the target had to be given specifically to the plaintiff.

Our comment

The BAG specifies the requirements for the timely setting and design of targets, but leaves open whether the impossibility of setting a target results solely from the failure to meet a set deadline for setting the target and whether the employee is entitled to compensation as a result. Employers must expect that they will have to adhere to self-imposed or agreed deadlines. Under no circumstances is it sufficient to announce company targets in general terms – for example at a company presentation. The target should always be declared directly to the individual employee, at best with proof.

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Permissibility of issuing a payslip via a digital employee mailbox

The right to receive a payslip can also be fulfilled by the employer by uploading it in text form into a password-protected digital employee mailbox.

BAG, decision of 28 January 2025 – 9 AZR 48/24

The case

The plaintiff is employed by a supermarket. The employer company is part of a group in which there is a group works agreement on “personnel documents”. In particular, this agreement stipulates that payslips are no longer provided in paper form, but exclusively via an external provider in a digital, password-protected employee mailbox, where employees can view and download their documents online. The plaintiff objected to the provision of her payslips via the digital mailbox and demanded that they continue to be sent in paper form. The plaintiff had never consented to the use of the digital portal. She claims that her lack of consent had not been replaced by the group works agreement and therefore sued for the monthly statements to be reissued in paper form. The Labour Court dismissed the action, while the Higher Labour Court upheld the plaintiff’s appeal.

The decision

The BAG upheld the defendant's appeal as well. An employer fulfils its statutory obligation to provide payslips if it makes them available exclusively electronically in a password-protected employee mailbox. The legally prescribed text form pursuant to Sec. 108 (1) Trade, Commerce and Industry Regulation Act (Gewerbeordnung / GewO) is also fulfilled in this way. The prerequisite is that the document is permanently accessible and unchanged in terms of content and that the sender remains clearly recognisable. Access within the meaning of Sec. 130 BGB is not required. It is also irrelevant whether the employees have given their consent or, if applicable, whether this has been replaced by a works agreement. The right to receive the payslip is a debt to be collected: the employer merely has to make it available at a suitable issuing point, which can also be electronic. Employees without private access to digital services must only be able to view and print out the statements at the company. However, the BAG left open the question of whether the group works council was responsible for the introduction and operation of the digital mailbox in this case. It therefore referred the case back to the Higher Labour Court.

Our comment

The BAG emphasises the fundamental permissibility of digital payslips, provided that the legal requirements and the interests of the employees are safeguarded. In order to avoid discrimination, employers alone are obliged to provide technical and organisational solutions that enable all employees to view and print out their payslips. However, the introduction, use and modification of payroll and information systems, e.g. PAISY, are subject to co-determination in accordance with Sec. 87 (1) No. 6 BetrVG. Overall, the BAG creates legal certainty for digital processes and thus strengthens a small piece of the mosaic for digitalisation in employment law without losing sight of the protection of employees.

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Fixed-term employment relationship and disproportionate probationary period agreement

If the agreed probationary period in a fixed-term employment relationship corresponds to the entire fixed-term period, the agreement on the probationary period is invalid in accordance with Sec. 15 (3) TzBfG.

BAG, decision of 5 December 2024 – 2 AZR 275/23

The case

The parties are in dispute about the validity of a dismissal. The plaintiff had been working at the defendant employer's car dealership since 22 August 2022. The employment relationship was on a probationary basis until 28 February 2023 and could also be terminated in writing by either party with two weeks' notice as part of a probationary period. The defendant then also terminated the employment relationship by letter dated 28 October 2022 with effect from 11 November 2022. In his lawsuit, the plaintiff challenges the termination and seeks a declaration that the employment relationship continues to exist. In his opinion, the agreed probationary period is ineffective as it is disproportionate to the duration of the fixed term and the nature of the work. The defendant had not issued an alternative ordinary notice of termination at the earliest possible date. The Labour Court dismissed the action by default judgement and the Higher Labour Court subsequently also dismissed the plaintiff's appeal.

The decision

However, the BAG partially upheld the plaintiff's appeal. The termination did not end the employment relationship until 30

November 2022 because the shortened two-week notice period pursuant to Sec. 622 (3) BGB did not apply. Instead, the four-week ordinary notice period pursuant to Sec. 622 (1) BGB applies. In the case of an employment contract with a fixed term of six months, the agreement of a six-month probationary period violates Sec. 15 (3) TzBfG and is therefore invalid: a probationary period that corresponds to the entire fixed term is disproportionate. A shortening to the permitted duration is also ruled out due to the prohibition of a reduction to preserve the validity of the contract.

However, the invalidity of the probationary period agreement does not affect the ordinary terminability of the employment relationship. In the case of a disproportionate probationary period agreement pursuant to Sec. 15 (3) TzBfG, the right to ordinary termination does not cease to apply if an agreement on the terminability itself is made in addition to or in the agreement on the probationary period. This was the case here, as the parties had agreed on a provision independent of the probationary period regulation regarding the basic cancellability during the fixed term.

Our comment

The current version of Sec. 15 (3) TzBfG introduced in 2022 is the first provision on the relationship between fixed-term employment relationships and probationary periods, which may last a maximum of six months in accordance with Sec. 622 (3) BGB and during which an employment relationship can be terminated with two weeks' notice. Unfortunately, the BAG does not specify what length of probationary period is reasonable for a fixed-term contract. The provision itself specifies two criteria, the expected duration of the fixed term and the type of activity; however, there are no more precise specifications. The BAG also does not specify percentage values or concrete parameters for a consideration, which is why the answer always depends on the individual case. In any case, the probationary period may not correspond to the entire fixed-term period. According to the court, something else can only apply in special circumstances. Above all, it is essential that ordinary termination is also agreed for fixed-term employment relationships, at best separately from the probationary period agreement.

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Return of a company car after justified leave of absence

The employer can reserve the right in the employment contract to revoke the private use of a company car if the employee is on justified leave. However, the cancellation can generally only be declared at the end of the month.

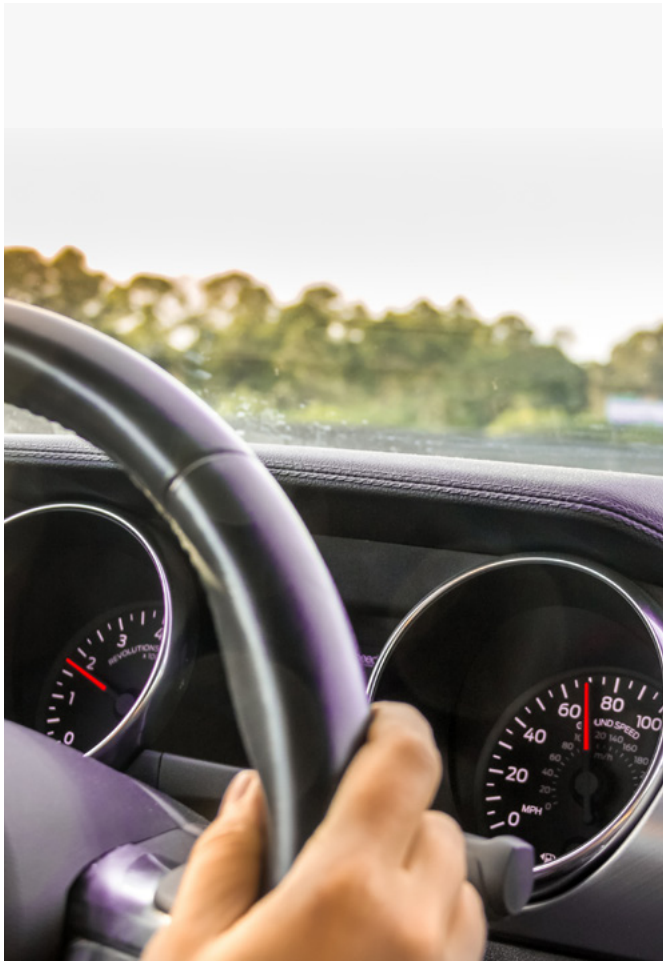
BAG, decision of 12 February 2025 – 5 AZR 171/24

The case

The defendant employer provided the plaintiff employee with a company car, which he was also authorised to use privately. In the employment contract, the parties agreed that the defendant may revoke the right to private use of the company car if, among other things, "the employment relationship has been terminated and the employer has justifiably released or suspended the employee from his obligation to perform work". On 8 May 2023, the defendant duly terminated the employment relationship with effect from 31 August 2023 and released the plaintiff from his duties with immediate effect. At the same time, he demanded the return of the company car by 24 May 2023. The plaintiff returned it on 23 May 2023, but subsequently sued for compensation for loss of use for the loss of private use. The lower courts dismissed the claim.

The decision

The plaintiff's appeal was partially successful. He was entitled to compensation for loss of use at least for the period from 23-31 May 2023. In the opinion of the BAG, the possibility of revoking the private use of the company car by the employer agreed in the employment contract was effective and stood up to a general terms and conditions review in accordance with Sec. 305 et seq. BGB. In particular, it was in the employer's interests if the right to private use of a company car can also be revoked in connection with a justified leave of absence. However, the exercise of the right of cancellation in this case did not correspond to equitable discretion within the meaning of Sec. 315 (1) BGB. The defendant had not taken into account the fact that, according to Sec. 6 (1) No. 4 Income Tax Code (Einkommensteuergesetz / EStG), the taxable monetary benefit for the private use of the company car can only be recognised on a monthly basis and not on a calendar day basis. If the company car is returned within the current month, the employee therefore also bears the tax burden for the time in which he can no longer use the company car privately. Therefore, as a rule, only a cancellation of private



use at the end of the month in question could be considered reasonable. As a result, the plaintiff had suffered a loss of use for the period from 23-31 May 2023, which the defendant had to compensate.

Our comment

According to established BAG case law, the agreement of a reservation of cancellation for the private use of a company car is permissible. Employers should also make use of this option in the employment contract or in a separate company car agreement in order to reserve the right to access the company car. However, the reasons that may justify a revocation must always be stated. In addition to authorised leave of absence, this applies in particular to cases of breaches of duty by the employee in connection with the use of the company car or if the employee is assigned another job that no longer requires a company car. Longer absences may also be covered. The exercise of the right of cancellation must generally correspond to reasonable discretion.

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■ CASE LAW IN BRIEF

Non-material damages due to data protection violations only in the event of a specific risk of misuse

A claim for compensation for non-material damages pursuant to Sec. 82 (1) GDPR requires a well-founded fear of misuse of the personal data concerned, for example through its publication on the internet.

BAG, decision of 20 February 2025 – 8 AZR 61/24

The case

The plaintiff employee was briefly employed by a legal predecessor of the defendant employer in 2016. In 2020, he requested information about the processing of his personal data in accordance with Sec. 15 GDPR and received it. In autumn 2022, he repeated his request twice, whereupon the defendant again provided him with information. The plaintiff considered this to be insufficient, which is why the defendant provided him with further information in December 2022. The plaintiff then claimed damages under Sec. 82 (1) GDPR because the defendant had not immediately complied with the obligation to provide information. He had suffered non-material damages as he had lost control of his data for weeks. In addition, all this had caused a considerable amount of concerns. The Labour Court awarded him damages, but the Higher Labour Court upheld the defendant's appeal and dismissed the claim.

The decision

The BAG followed the Higher Labour Court and dismissed the plaintiff's appeal. He was not entitled to compensation. It was irrelevant whether there had been a breach of the duty to provide information at all. In any case, no damage occurred. Although the (even short-term) loss of control over personal data could constitute immaterial damage within the meaning of Sec. 82 (1) GDPR, this was not the case here. A delay in providing information does not result in a loss of control. This could be the case even if the data has not been misused. The fear of misuse could also constitute non-material damage. However, the purely hypothetical risk of misuse cannot lead to compensation. Rather, a justified fear is required, for example in the case of a data leak and the publication of sensitive data on the internet. In addition, there is also no immaterial damage due to the plaintiff's negative feelings. Something different only applies if an offence has such serious consequences that damage in the form of fears can be

assumed as a matter of course, e.g. in the case of a data leak relating to bank or health data. Generalised expressions of displeasure are not sufficient.

Registered mail and proof of receipt

The mere presentation of the proof of posting of a registered letter and the description of the mailing process do not in themselves constitute prima facie evidence of receipt of the posted mail item by the recipient.

BAG, decision of 30 January 2025 – 2 AZR 68/24

The case

The defendant employer terminated the employment relationship with the plaintiff employee in a letter dated 14 March 2022 without notice, or alternatively with due notice as of 30 April 2022. The plaintiff filed an action for unfair dismissal against the termination on 18 March 2022 and referred to her pregnancy. The competent regional council granted the defendant approval for the dismissal on 25 July 2022. The defendant then pointed out that he had given further extraordinary and alternatively ordinary notice of termination in a letter dated 26 July 2022. An employee sent the termination as a registered letter, according to the delivery status it had been delivered on 28 July 2022. The plaintiff disputed receipt. The Labour Court dismissed the action for protection against dismissal, the Higher Labour Court upheld it.

The decision

The defendant's appeal was unsuccessful. According to the BAG, the defendant had not offered any evidence for the posting of the letter of dismissal in the plaintiff's letterbox. There was also no prima facie evidence. The proof of posting of the letter of dismissal submitted, in which only the date and time of posting and the posting number were evident, together with a mailing status queried by the defendant on the internet, was not sufficient for prima facie evidence that the letter had actually been received.

Abuse of rights in the event of unchecked acceptance of freelance work

In the context of an employment relationship that was wrongly treated as freelance work, the employer's claim for repayment of an excessive fee is not always precluded by the defence of abuse of rights.

BAG, decision of 4 December 2024 – 5 AZR 272/23

The case

The subject of the dispute is the repayment of fees and VAT. The plaintiff employer made payments to the defendant employee between 2015 and 2018 for activities within the scope of a contractual relationship treated as freelance work. There were no written agreements. The plaintiff subsequently argued that she had an employment relationship with the defendant, meaning that the services should have been remunerated for EUR 3.70 / hour less. There was also no legal basis for the VAT charged in the absence of freelance work. The plaintiff therefore requested the repayment of overpaid fees in the amount of EUR 16,744.20 and VAT of EUR 15,864.57 that had been paid.

The decision

The BAG referred the case back to the Higher Labour Court for a new hearing and decision, but gave instructions for the further proceedings. Firstly, the court would have to examine whether an employment relationship existed during the period in question. Should this be the case, the plaintiff's demand for repayment of excessive fees could in principle be precluded by the defence of abuse of rights pursuant to Sec. 242 BGB. This objection is based on the legitimate expectations of the employee. Whether there is protection of legitimate expectations in a specific case depends on the circumstances that led to the employment being established as freelance work. The mere assumption of freelance work and corresponding remuneration are generally not sufficient for this. On the other hand, the Higher Labour Court had to take into account that the plaintiff, within the framework of Sec. 812 (1) Sentence 1 Alt. 1 BGB, the plaintiff would also have to take into account the employer's share of the total social security contribution due on the usual remuneration. Insofar as an employment relationship existed between the parties, a repayment of the wrongly paid VAT is possible in principle. The defendant could in turn demand reimbursement from the tax authorities.

Deadline regulation as a general prerequisite for entitlement to a special allowance

If a collective agreement provision on a special annual payment stipulates that beneficiaries receive this "with the November salary", this is not a mere due date provision, but a prerequisite for the payment in that a salary is paid in this month and therefore an employment relationship exists at this time.

Higher Labour Court Mecklenburg-Vorpommern, decision of 28 January 2025 – 5 SLa 115/24

The case

The employment relationship of the plaintiff employee was governed by a collective labour agreement which contained a provision on a special payment. This stated: "Employees receive an annual special payment with their November salary in the amount of 100 % of the gross monthly salary. In the year of joining the company, the annual special payment is paid pro rata temporis at 1/12 for each full month of employment." The employment relationship ended on 31 August 2023 when the plaintiff gave notice. When he did not receive a special annual payment for 2023, he sued for the full amount and alternatively for 8/12. In his opinion, the provision that the payment is made with the November salary is only a due date regulation. The Labour Court dismissed the claim.

The decision

The Higher Labour Court Mecklenburg-Vorpommern ruled in the same way. The plaintiff was not entitled to the annual bonus payment. Collective agreement deadline regulations for bonuses are generally permissible. If special payments are only to be paid for periods in which a remuneration claim exists, this shows that it is remuneration for work performed. If the payment requires the employment relationship to exist on a certain date, e. g. 1 December, the benefit also serves to honour loyalty to the company in the year coming to an end. The different treatment resulting from the associated differentiation is objectively justified if the benefit is also intended to reward loyalty to the company and motivate the beneficiaries to work actively and with commitment. This purpose can no longer be achieved in the case of employees who have already left the company. The present wording conceptually presupposes that the employee receives remuneration for the month of November, which in turn requires an existing employment relationship at least on one day in November. The parties to the collective agreement had thus not only determined the due date of the entitlement, but also a condition for it, and had expressly referred to the receipt of a remuneration payment for November.

Alcohol ban during non-working hours on board a ship does not require on-call duty

The restriction of leisure activities for masters on board a ship during their off-duty hours by prohibiting the consumption of alcohol does not lead to the existence of on-call time if the prohibition serves the purpose of safety on board.

Higher Labour Court Hamburg, decision of 13 November 2024 – 7 SLa 16/24

The case

The plaintiff is employed by the defendant employer as a ship's captain. His assignments on ships sometimes last several months. The employment relationship is governed by a collective agreement that contains a provision stipulating flat-rate overtime pay for crew members with the exception of captains. In March 2022, the plaintiff asked the defendant whether he was allowed to drink alcohol on board outside of his working hours. An employee then emailed him to point out the employer's zero-tolerance policy regarding alcohol and drugs on board due to the laws regulating the safe working environment. This must also apply during off-duty hours, as in emergencies it must be ensured that the seafarers are able to perform their duties. One year later, however, the plaintiff demanded compensation for 11,120 hours of on-call time, which he then sued for. In his opinion, he had always had to be on call, which also followed from the email from the defendant's employee. The Labour Court dismissed the claim.

The decision

This was also the decision of the Higher Labour Court Hamburg. The plaintiff's off-duty periods were not to be regarded as on-call times subject to remuneration. The defendant had not ordered any on-call times for the plaintiff, neither expressly nor impliedly. Furthermore, the ban on alcohol on board had already been agreed when the

employment contract was concluded, in which an annex stipulates, among other things, that no employee may be under the influence of alcohol or drugs on board at any time. Moreover, the existence of the prohibition during the entire stay on board does not result in an order for on-call time, even if this may restrict leisure activities. If a ship is at sea, the constant presence of the crew members results from the nature of the matter. If a restriction on leisure activities is intended to ensure safety on board, the assumption of an implicitly ordered on-call duty cannot be justified.

Deferred compensation without employer contribution

Collective agreements win?! A recent ruling by the BAG shows that even old collective agreements can exclude deferred compensation for employees.

The third BAG senate responsible for occupational pension law was recently one of the most active senates at Germany's highest labour court – and has now once again handed down a key ruling. According to the judges, a final provision on deferred compensation in a collective agreement takes precedence over the statutory entitlement under Sec. 1a German Occupational Pensions Act (Betriebsrentengesetz / BetrAVG), even if the collective agreement was concluded before the Occupational Pension Strengthening Act came into force (BAG, decision of 11 March 2025 – 3 AZR 53/24).

In the case in question, the plaintiff had been employed by the defendant since 1995. By virtue of mutual collective bargaining coverage, the collective agreements for the public sector of local authorities applied to the employment relationship. These included, among others, the collective agreement on deferred compensation for employees in the municipal public sector of 18 February 2003 (TV-EUmw/VKA). This regulates the principles for converting remuneration components under collective agreements for the purpose of occupational pension schemes. The collective agreement does not contain any provisions on an employer's contribution. On the basis of the collective agreement

provisions, the plaintiff converted remuneration components on a monthly basis and took the view that the defendant was obliged to pay him an employer's contribution amounting to 15% of the monthly conversion amounts. The provision of § 1a BetrAVG, which came into force on 1 January 2018, had not been waived by the TV-EUmw/VKA, which had been concluded around fifteen years earlier. In his action, he sought payment of arrears and future payment of the corresponding employer contributions. The ArbG and LAG upheld the action.

The BAG meanwhile upheld the appeal and dismissed the action. The provision in Sec. 1a BetrAVG had indeed been effectively waived. This applied despite the fact that the statutory provision on the employer's subsidy had only come into force after the TV-EUmv/VKA had been concluded. An express provision in the collective agreement was not necessary. It was sufficient that the TV-EUmv/VKA conclusively regulated the conversion of remuneration without an employer subsidy. The decision thus contains two key statements relevant for practice:

1. If a collective agreement conclusively regulates the conversion of remuneration, it takes precedence over the statutory provision in Sec. 1a BetrAVG. This also applies if the collective agreement was concluded before the Occupational Pension Strengthening Act came into force. Whether a conclusive provision exists must be determined by interpretation.
2. If the collective agreement is silent on the question of the employer's contribution, this is deemed to have been waived.

What at first glance appears to be a welcome strengthening of collective bargaining autonomy, on closer inspection leads to unfortunate consequences for employees and legal uncertainty for employers. This is because, insofar as collective agreements do not contain any provisions on employer contributions, those entitled to benefits cannot invoke Sec. 1a BetrAVG. Employers bound by collective agreements, on the other hand, must carefully check whether the collective agreement applicable to them contains a final provision on deferred compensation.

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Austria: Digital accessibility becomes mandatory – The European Accessibility Act and its national implementation in Austria

With the Accessibility Act (Barrierefreiheitsgesetz / BaFG), Austria is transposing EU Directive 2019/882 (European Accessibility Act) into national law. The aim is to give people with disabilities equal access to digital products and services. The law comes into force on 28 June 2025 and represents a paradigm shift: accessibility will no longer be voluntary, but mandatory.

Who is affected?

The law applies to all so-called "economic operators" – i.e. manufacturers, service providers, retailers and importers. In particular, digital services such as web shops, appointment booking systems or apps are covered if they are offered as part of a consumer contract.

Are there any exceptions?

Micro-enterprises with fewer than ten employees and an annual turnover or annual balance sheet total of less than EUR 2 million are exempt from the obligation for services, but not for the manufacture of products.

What needs to be done?

The requirements for accessibility are high: information must be perceptible via at least two senses, and functions such as payment and identification must be designed to be accessible. Companies must also ensure that their offerings are compatible with assistive technologies (e. g. screen readers).

Deadlines and sanctions

Existing contracts and systems enjoy transitional periods of up to five or 20 years. Violations can result in severe fines - up to EUR 80,000 depending on the size of the company.

Conclusion

Digitalisation has fundamentally changed the interaction between companies and consumers. While this change facilitates access to services on the one hand, it also threatens to exclude certain population groups from digital participation on the other. With the Accessibility Act, the

Austrian legislator has now created a legal framework to ensure the digital inclusion of people with disabilities.

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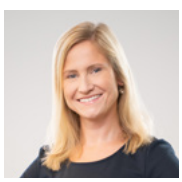

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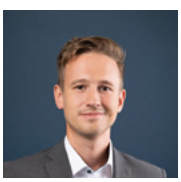

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