



YOUR BUSINESS LAW FIRM



# Employment Tracker

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OCTOBER 2023

## Stay up to date with us

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With our Employment Tracker, we regularly look into the "future of labour law" for you!

At the beginning of each month, we present the most important decisions expected for the month from the Federal Labour Court (BAG) and the European Court of Justice (ECJ) as well as other courts. We report on the results in the issue of the following month. In addition, we point out upcoming milestones in legislative initiatives by politicians, so that you know today what you can expect tomorrow.

## Recent decisions

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With the following overview of current decisions of the past month, you are informed which legal issues have been decided recently and what impact this may have on legal practice!

Subject	Date/ AZ	Remark/ note for practice
<b>Federal Labour Court</b>		
<b>Eligibility for part-time employment during the period of parental leave</b>	05.09.2023 - 9 AZR 329/22 -	No press releases were issued on either decision. Details will follow when the reasons for the judgments are released.
<b>Reduction of the standard severance payment for cohorts close to retirement age</b>	19.09.2023 - 1 AZR 15/23 -	

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## Upcoming decisions

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With the following overview of upcoming decisions in the following month, you will be informed in advance about which legal issues will be decided shortly and what consequences this may have for legal practice!

Subject	Date/ AZ	Remark/ note for practice
<b>Federal Labour Court</b>		
<b>Entitlement to vacation pay in case of long-term disability prior to the commencement of partial retirement release phase.</b>	17.10.2023 - 9 AZR 577/20 -	<p>The Federal Labour Court had to address vacation compensation claims once more, this time relating to a prolonged period of incapacity before the partial retirement release stage.</p> <p>The plaintiff entered into a partial retirement contract with the defendant employer using the block model. However, in 2016, illness caused the plaintiff to be unfit for work, leading them to be incapable of availing all of the authorized leave when in the work stage.</p> <p>For this reason, the plaintiff demands compensation for the unused vacation days.</p> <p>The defendant believes the plaintiff is not eligible for vacation compensation. According to the guidelines on extended incapacity for work, the legal portion of the vacation benefit expired by no later than March 31, 2018. The plaintiff was unable to take any vacation during their leave of absence, which resulted in the expiration of their remaining annual leave for 2016 during that time.</p> <p>In October 2021, the Federal Labour Court suspended the legal dispute and referred the matter to the European Court of Justice for a preliminary ruling. The Federal Labour Court sought clarification on whether European Union law allows for the forfeiture of vacation entitlements at the end of the vacation year or even after a longer period, when an employee</p>

transitions from the working phase to the release phase of their partial retirement employment relationship without having utilized their vacation time from the same calendar year in its entirety.

In a ruling on April 27, 2023, documented as C-192/22, the European Court of Justice deemed it a violation of EU law for employers to forfeit an employee's vacation time if they were unable to take it due to illness before the release phase. The Federal Labour Court is responsible for hearing the plaintiff's appeal, and must consider the European Court of Justice's decision during deliberation.

<p><b>Works council co-determination in the case of instructions to refrain from private use of mobile phones/smartphones during working hours</b></p>	<p>17.10.2023</p>	<p>The issue is whether the prohibition of private use of cell phones/smartphones during working hours is subject to works council co-determination.</p>
	<p>- 1 ABR 24/22 -</p>	<p>The employer has issued a written notice stating that the use of mobile phones/smartphones during working hours is not permitted and that there will be consequences under employment law if this is not complied with.</p>
		<p>The works council is of the opinion that the employer should have consulted it beforehand. Its right of co-determination follows from the fact that at least the proper conduct of the employees is affected. The use of a smartphone does not necessarily and inevitably interfere with the performance of duties under the employment contract. The works council initiated a resolution procedure to clarify this issue.</p>
		<p>The employer, on the other hand, is of the opinion that there is no right of co-determination because only the employees' work behaviour is affected. The prohibition merely substantiates the duty to work.</p>
		<p>The lower courts (including the Lower Saxony Regional Labour Court, decision dated October 13, 2022 – 3 TaBV 24/22), rejected the works council's motions. According to Section 87 (1) no. 1 of the Works Constitution Act (<i>Betriebsverfassungsgesetz – BetrVG</i>), the ban on using smartphones for personal purposes during work hours is not subject to co-determination by the works council. According to the primary regulatory purpose of this directive,</p>

it does not regulate behaviours that accompany work. The goal of the measure is to identify which activities employees must avoid during working hours.

The works council persists in their appeal to the Federal Labour Court.

<b>Compensation for default of acceptance</b>	18.10.2023	In regards to claims for default of acceptance wages, the Federal Labour Court must determine whether assuming unpaid activity constitutes maliciously failing to earn wages elsewhere.
<b>Malicious failure to earn other income when accepting unpaid work</b>	- 5 AZR 331/22 -	<p>The plaintiff served as the defendant's managing director until her termination and continued working as an employee with remunerated conditions afterwards.</p> <p>The defendant provided multiple notices of termination, either without notice or with regular notice. Consequently, on May 1, 2014, the plaintiff was released from their employment. Afterward, the plaintiff assumed the position of managing director at another company, but without compensation. The most recent notice of termination, effective on October 1, 2014, officially ended following a conclusive decision from the Thuringia Regional Labour Court, the employment relationship between the parties.</p> <p>The plaintiff is claiming default of acceptance for the period between May and September 2014, and cannot offset any other earnings against these claims. During that time, she worked as a managing director for another company but did not receive any remuneration for this role. As per the contract, she was entitled only to a share in the profits. Due to start-up losses, no distribution has been made yet.</p> <p>The defendant believes that the plaintiff is not entitled to any claims for default of acceptance wages. The plaintiff intentionally refused to accept consideration for her position as a managing director at a competing company.</p> <p>The plaintiff was granted the claimed default acceptance wages in prior rulings, including the decision of the Thuringia Regional Labour Court on September 6, 2022 – 1 Sa 427/20. The Regional Labour Court clarified that the responsibility to provide evidence for intentional suppression of other earnings rests with the employer. A mere reference from the employer about the availability of open job positions in the labour market cannot prove the employee's</p>

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ability to earn alternate income. The plaintiff did not intentionally avoid seeking appropriate employment and worked as an uncompensated business manager. The omission of income cannot be ruled out in such situations where the plaintiff opts for an unpaid job. However, the circumstances and reasons that led to the acceptance of unpaid activity must be examined. If no reasonable reasons can be found for assuming unpaid work or if payment was offered, the only remaining motive would be to prevent the possibility of receiving credit. However, in the case of the plaintiff, there was no recognizable intention to cause harm.

The defendant disputes this and has appealed to the Federal Labour Court.

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**Reimbursement of works council costs without necessity**

25.10.2023  
- 7 AZR 338/22 -

The parties are at odds over whether the employer can recoup costs initially paid for works council activities from the works council member in question, citing a lack of necessity for the expenses.

The plaintiff is a member of the works council established at the employer's organization. Based on a works council resolution, the plaintiff was to take part in three labour law training courses. The defendant did not authorize participation in the training courses due to travel restrictions until further notice caused by the COVID-19 pandemic. As the pandemic partially postponed the training courses, the works council passed a new resolution for the plaintiff's participation at the revised training schedule.

The defendant was notified through a lawyer's letter and requested to approve the plaintiff's attendance in the aforementioned seminars. The attorney for the plaintiff billed the defendant for their services. The defendant passed along the invoice to the Works Council, asking them to present it to the plaintiff for personal reimbursement. The defendant noted that the Works Council had not passed any resolution regarding the engagement of the lawyer.

Since the plaintiff did not make the payment, the defendant settled the invoice but deducted the invoice amount from the plaintiff's net earnings under the label "Attorney for Advance Payment Specialist for Labour Law."

The plaintiff is now requesting payment of the withheld amount. He believes that according to Section 40 of the Works Council Constitution Act (*Betriebsverfassungsgesetz – BetrVG*),

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the defendant is responsible for the legal expenses of the works council, even if an individual works council member pursues an ongoing seminar claim.

Conversely, the defendant maintains that an employee who hires a lawyer has no right to reimbursement from the employer, applying the analogous application of Section 12a Labour Court Act (*Arbeitsgerichtsgesetz – ArbGG*). Furthermore, there was no appropriate works council resolution regarding the hiring of an attorney. Following the denial of the training sessions, the works council should have addressed the issue initially.

The Labour Court dismissed the action, which was upheld by the Regional Labour Court (Lower Saxony, judgment dated August 30, 2022 - 9 Sa 945/21). According to the Regional Labour Court, the appointment of a lawyer was not necessary within the meaning of Section 40 BetrVG. However, the defendant could not demand reimbursement of the attorney's fees it had paid pursuant to Sections 683, 670 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) or Sections 684, 812 (1) sentence 1 alt. 1 BGB. In this respect, the provisions of the management without order pursuant to Sections 677 et seq. BGB shall be replaced by Sections 2 (1), 40 (1), 78 sentence 2 BetrVG.

The defendant's appeal is directed against the judgment of the Regional Labour Court.

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## Legislative initiatives, important notifications & applications

This section provides a concise summary of major initiatives, press releases and publications for the month, so that you are always informed about new developments and planned projects.

Subject	Timeline	Remark/ note for the practice
<p><b>Cornerstones to reduce bureaucracy adopted</b></p>	<p>30.08.2023</p>	<p>On August 30, 2023, the German Cabinet approved a key issue paper for the Bureaucracy Relief Act. The paper outlines several changes to labour law, including the following:</p> <ul style="list-style-type: none"> <li>▪ Eliminating or replacing civil law's written form and signature requirements with text form requirements. The standard form will be electronic or text form instead of the written form.</li> <li>▪ <b>Changes to employment contracts/subcontracts:</b> A provision will be incorporated into the Verification Act stating that the employer's obligation to furnish evidence of the fundamental contract terms will not be applicable if and to the extent that an employment contract has been entered into in a statutory electronic format that supersedes the written format. The same holds for amendment agreements established in electronic form in the event of material contractual modifications.</li> <li>▪ <b>Employment references:</b> The rules governing employer references (Section 630 of the German Civil Code (BGB), Section 109 of the German Trade, Commerce and Industry Regulation Act (GewO)) should also allow for electronic versions to be used as a statutory alternative.</li> <li>▪ <b>Working Hours:</b> The revisions to the Working Hours Act and the Youth Employment Protection Act will require employers to fulfil posting obligations even when information is made available electronically through commonly-used information and communication technology, such as the company intranet. Employees must have unrestricted access to this information.</li> <li>▪ <b>Parental Leave and Allowance:</b> The written requirement for the Federal Parental Allowance and Parental Leave Act that mandates written applications for reducing working hours, rejecting applications, and asserting parental leave entitlement will now be replaced by electronic form.</li> </ul>

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<b>Employee Data Protection Act to be passed this year</b>	30.08.2023	<p>On August 30, 2023, the German Cabinet adopted the National Data Strategy and declared that the opening clauses of the GDPR would be utilized to establish legal lucidity for employers and employees through a modernized, convenient Employee Data Protection Act and to ensure effective safeguarding of employees' personal rights.</p> <p>The Employee Data Protection Act is scheduled to take effect in the fourth quarter of this year.</p>
<b>Regulation issued to promote skilled labour immigration development</b>	31.08.2023	<p>The regulation for advancing skilled labour immigration was announced on August 31, 2023. The purpose of the ordinance is to simplify and substantially enhance the entry of skilled foreign workers and employees. Thus, in the future, adequate professional experience plus a minimum of two years of professional and university degree will qualify individuals for employment in unregulated professions. In addition, the recognition partnership enables employers to assist skilled foreign workers in achieving recognition of their qualifications acquired abroad.</p>

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## Local presence: your contacts



Dr. Ulrich Fülbier

**Head of labour and  
employment law**  
Prinzregentenstrasse 22  
80538 Munich  
P: +49 89 3090667 62  
ufuelbier@goerg.de



Dr. Thomas Bezani

Kennedyplatz 2  
50679 Cologne  
P: +49 221 33660 544  
tbezani@goerg.de



Dr. Axel Dahms

Kantstrasse 164  
10623 Berlin  
P: +49 30 884503 122  
adahms@goerg.de



Burkhard Fabritius, MBA

Alter Wall 20 – 22  
20457 Hamburg  
P: +49 40 500360 755  
bfabritius@goerg.de



Dr. Dirk Freihube

Ulmenstrasse 30  
60325 Frankfurt am Main  
P: +49 69 170000 159  
dfreihube@goerg.de



Dr. Ralf Hottgenroth

Kennedyplatz 2  
50679 Cologne  
P: +49 221 33660 504  
rhottgenroth@goerg.de



Dr. Martin Hörtz

Ulmenstrasse 30  
60325 Frankfurt am Main  
P: +49 69 170000 165  
mhoertz@goerg.de



Dr. Alexander Insam, M.A.

Ulmenstrasse 30  
60325 Frankfurt am Main  
P: +49 69 170000 160  
ainsam@goerg.de



Dr. Christoph J. Müller

Kennedyplatz 2  
50679 Cologne  
P: +49 221 33660 524  
cmueller@goerg.de



Dr. Lars Nevian

Ulmenstrasse 30  
60325 Frankfurt am Main  
P: +49 69 170000 210  
lnevian@goerg.de



Dr. Marcus Richter

Kennedyplatz 2  
50679 Cologne  
P: +49 221 33660 534  
mrichter@goerg.de



Dr. Frank Wilke

Kennedyplatz 2  
50679 Cologne  
P: +49 221 33660 508  
fwilke@goerg.de

**GÖRG**

YOUR BUSINESS LAW FIRM

## Never Far Away – Our Offices

### **BERLIN**

T: +49 30 884503-0  
berlin@goerg.de

### **HAMBURG**

T: +49 40 500360-0  
hamburg@goerg.de

### **FRANKFURT AM MAIN**

T: +49 69 170000-17  
frankfurt@goerg.de

### **COLOGNE**

T: +49 221 33660-0  
koeln@goerg.de

### **MUNICH**

T: +49 89 3090667-0  
muenchen@goerg.de