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Employment Tracker

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Stay up to date with us

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.

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Recent decisions

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
Federal Labour Court		
Offsetting of leave granted in the event of a wrongful termination of a dual employment relationship	05.12.2023 - 9 AZR 230/22 -	**If an employee takes another job after being unfairly dismissed, the employee is entitled to full vacation entitlement from both the old and the new employer for the period during which the two employment relationships overlap, even if the employee would not have been able to fulfil the obligations from both employment relationships cumulatively.** **In such a case, however, in order to avoid double vacation entitlements, the vacation entitlement of the employee from the new employer must be offset against the vacation or vacation compensation entitlement from the old employer pursuant to Sec. 11 no. 1 of the German Unfair Dismissals Act (KSchG) and § 615 sentence 2 of the German Civil Code (BGB). The offset shall be made in relation to the calendar year.** *The 9th Senate of the Federal Labour Court decided this in December 2023. The reasons for the decision were recently published.* Facts of the case The dispute was whether the plaintiff had to offset the vacation time granted to him by another employer during the protection against dismissal litigation against his vacation time claims against his old employer in corresponding application of Sec. 615 sentence 2 BGB, Sec. 11 KSchG (German Unfair Dismissal Act).

The plaintiff was dismissed by the defendant without notice. The Labour Court upheld the employee's action against the dismissal and ruled that the dismissal was invalid. In 2021, the defendant again terminated the employment relationship. Thus, the employment relationship between the parties was terminated before the end of May 2021.

During the pendency of the unfair dismissal proceedings, the plaintiff started a new employment relationship with another employer. This employer granted the plaintiff leave of 25 working days in 2020 and 10 working days in 2021 until the date of termination of the employment relationship with the defendant.

The plaintiff is of the opinion that she is entitled to compensation from the defendant. In particular, the vacation granted by the new employer can only be offset against the vacation claims against the defendant with respect to her statutory minimum vacation entitlements.

The decision of the Federal Labour Court

The Federal Labour Court ruled only partially in favour of the plaintiff.

The 9th Senate held that the statutory holiday entitlement is based solely on the existence of an employment relationship. The fact that the plaintiff did not perform any work for the defendant after the termination without notice did not change this. The period of non-employment after an invalid termination is in principle to be equated with an actual period of employment. This also applies in the case of a so-called dual employment relationship. The fact that the employee asserts the continuation of the terminated employment relationship in a dismissal protection action and enters into another employment relationship during this period is irrelevant for the accrual of vacation entitlement.

However, taking into account the legal concept of Sec. 11 KSchG and Sec. 615 Sentence 2 BGB, the plaintiff must allow the vacation time granted to her by the new employer to be offset against her vacation time claims against the defendant. Such an offset is usually considered if the employee enters into an employment relationship with a new employer instead of the previous full-time employment relationship, which also includes full-time work.

In the present case, the set-off applied not only to the statutory minimum vacation, but also to the contractual additional vacation. According to the Federal Labour Court, the offsetting

		therefore led to the complete loss of the plaintiff's vacation entitlement from 2020 against the defendant.
Continued payment of wages due to coronavirus infection and official quarantine order	20.03.2024 - 5 AZR 235/23 -	**A SARS-CoV-2 infection, even if asymptomatic, is a disease under Sec. 3 (1) EFZG that leads to incapacity for work if the employee is legally unable to perform his or her work on the employer's premises due to an official isolation order and cannot perform his or her work at home.** *The 5th Senate of the Federal Labour Court decided this.* Facts It was disputed whether there is an entitlement to continued payment of wages even if the authorities order home quarantine due to infection with the corona virus, but the employee has not submitted a certificate of incapacity for work. In 2021, the plaintiff was unable to work due to an infection with the corona virus. He had not been vaccinated against the coronavirus. The plaintiff submitted a certificate of incapacity for the first 5 days of his incapacity. The plaintiff then received an official quarantine order for 12 days. As the plaintiff was employed by the defendant employer as a production worker, it was not possible for him to work from home. The doctor refused to issue a follow-up disability certificate, stating that the test result and the quarantine order were sufficient evidence of disability. The plaintiff did not receive continued remuneration for the period of official quarantine, which he is now claiming in court. He believes that the claim is based on the Continued Remuneration Act. He was unable to perform his work because he was ill. In addition, it was objectively unreasonable for him to go to work because he would have exposed others to the risk of becoming ill. Alternatively, the plaintiff is entitled to a claim under Sec. 56 IfSG. In particular, the mere omission of a vaccination does not already lead to the exclusion of a claim pursuant to Sec. 56 (1) sentence 4 IfSG, since an infection with the Corona virus could not have been prevented. The defendant is of the opinion that the plaintiff is not entitled to continued remuneration because he did not submit a certificate of incapacity for the period in question. An asymptomatic infection does not justify a right to continued payment of wages. In any event, the

plaintiff was at fault within the meaning of Sec. 3 (1) Sentence 1 EFZG, due to his failure to be vaccinated, so that a claim for continued payment of wages was excluded. A claim for reimbursement pursuant to Sec. 56 IfSG was also excluded due to the plaintiff's lack of vaccination against the corona virus.

The decision of the Federal Labour Court

The Fifth Senate ruled that the Court of Appeal had correctly recognized that the plaintiff was prevented from performing his work due to the SARS-CoV-2 infection as a result of incapacity due to illness, without it being relevant whether he had symptoms of COVID-19 throughout.

The SARS-CoV-2 infection constituted an abnormal physical condition and thus a disease resulting in disability. The isolation order was not an independent, parallel cause of the incapacity for work; rather, the resulting ban on work was based precisely on the infection.

Nor was it possible to establish with the necessary certainty that the failure to take the recommended coronavirus vaccination was the cause of the infection. It is true that the failure to take the vaccinations was a gross violation of the conduct expected of a reasonable person. However, due to the risk of breakthrough of the vaccination, it could not be established with the necessary certainty that the corona infection could have been prevented by taking the vaccination.

The plaintiff had also met its burden of proof by submitting the administrative order. By submitting the administrative order, it was sufficiently proven that the plaintiff was objectively prevented from performing his work because of his corona virus infection.

Upcoming decisions

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
Federal Labour Court		
Compensates for changing, body cleaning, and internal travel time	23.04.2024 - 5 AZR 212/23 -	The parties are in dispute over the plaintiff's entitlement to compensation for time spent traveling, changing clothes, and cleaning. The plaintiff is employed by the defendant employer as a container mechanic. On a normal working day, the plaintiff first enters the building containing the locker room, the time recording terminal and his workplace. Before entering the building containing the locker room, the plaintiff's presence is electronically recorded. The plaintiff picks up his work clothes on the second floor and then goes to the locker room to change. Plaintiff then goes to his workstation and logs on to the time clock on the way there. The plaintiff is not required to enter the time at which he enters the facility or the locker room, but rather the time at which his shift begins or ends, as specified in the shift schedules. At the end of his shift, he clocks out, goes to the locker room to shower and change, and then goes home. The plaintiff now seeks additional compensation for the actual days worked. He claims that, in addition to the time worked at the workplace, the defendant should pay for the time spent walking from the gate to the locker room, changing clothes, walking from the locker room to the workplace, walking from the workplace to the locker room, cleaning, showering and changing clothes, and walking from the locker room to the gate, a total of 55 minutes per working day. The Respondent counters that the time claimed is not compensable working time. This follows from the relevant collective bargaining agreement and an applicable general works

		agreement. Nor can an obligation to pay remuneration be derived from Sec. 611a (2) BGB. Showering was neither ordered nor necessary for reasons of health protection. The lower courts awarded the plaintiff part of the compensation claimed. A substantial portion was forfeited due to an exclusion clause contained in the collective bargaining agreement. The plaintiff was upheld on the remaining claims. The time required to change clothes before and after work, to clean up after work, and to walk from the locker room to the workplace and from the workplace to the locker room was to be compensated separately, as these times constituted compensable working time. In particular, the time spent cleaning the body is considered to be working time subject to remuneration if it is a matter of time spent cleaning the body, which must be spent because the soiling of the body goes far beyond the extent that is usual in private life. It is irrelevant that the soiling of the body makes it unreasonable to leave the company without taking a shower. According to the court's estimate, the time required for changing clothes, cleaning the body and walking from the changing room to the workplace and back is 21 minutes per working day. The Federal Labour Court must now decide whether the Regional Labour Court's ruling is legally correct.
Hiring a personal assistant for a severely disabled person of the same age = age discrimination?	25.04.2024 - 8 AZR 208/21 -	The plaintiff claims to have been discriminated against on the basis of her age in the course of a recruitment procedure and seeks compensation pursuant to Sec. 15 (2) AGG. The defendant employer is a company specializing in assistance and counselling for people with disabilities. In 2018, it was looking for personal assistants to support a 28-year-old student in all areas of her daily life. According to the advertisement, the applicants should be "preferably between 18 and 30 years old". A rejected applicant, who did not belong to this age group, feels that she was discriminated against based on her age and is therefore seeking compensation from the defendant. She claims that age is not a permissible professional requirement for the assistance service, as age is not relevant to the relationship of trust with the disabled person. The Labour Court ordered the defendant to pay compensation and dismissed the remainder of the claim. On the defendant's appeal, the Regional Labour Court dismissed the claim in its entirety. In her appeal, the plaintiff continues to pursue her claim for compensation and

	seeks to reinstate the judgment of the court of first instance. The 8th of the Federal Labour Court asked the ECJ to answer a question, in particular on the interpretation of the Framework Directive 2000/78/EC on equal treatment, which it did in its judgment of December 7, 2023 - C-518/22. The ECJ ruled that the employment of a personal assistant to assist a person with a disability in everyday life could be reserved for people of the same age group. The Federal Labour Court will now rule in light of the ECJ's decision.

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
Pension Package II	05.03.2024	On March 5, the draft of a law to stabilize pension levels and build up intergenerational capital in the statutory pension insurance was published. The aim of the law is to keep the statutory pension system stable in the long term in terms of pension levels and financially viable in terms of expenditure development, and to ensure that the statutory pension system remains reliable for younger generations. The bill contains the following provisions at a glance: **Stable pension level** ▪ Under current law and without Pension Package II, the pension level would soon fall below 48% and even below 45% in the longer term. The draft contains a level protection clause, which sets the current pension value in such a way that the pension level reaches 48%. ▪ Pensions will remain linked to wage growth. **Contribution rates** ▪ According to current projections, the contribution rate will remain stable at 18.6% until 2027. From 2028, the rate is expected to rise to 20% and from 2035 to 22.3%, which will then remain stable until 2045 thanks to generational capital. **Generational capital** ▪ In order to reduce the burden on contributors in the long term, a permanent capital stock will be built up with loans from the federal budget and the transfer of own funds by the federal government. No contributions are paid into this capital stock.

		▪ The additional financing of the statutory pension insurance by the "Generation Capital" foundation is intended to reduce the contribution rate from 2036 onwards by paying out an average of 10 billion euros per year.
Platform Work Directive Coming	11.03.2024	In a March 11 press release, the Council confirmed the agreement on new rules to improve working conditions for platform workers. The EU legislation aims to improve working conditions and regulate the use of algorithms by digital work platforms. The directive will make the use of algorithms for personnel management more transparent and ensure that automated systems are supervised by qualified personnel and that workers have the right to challenge automated decisions. It will also help to correctly determine the employment status of people working for platforms, enabling them to claim all the workers' rights to which they are entitled. At the heart of the compromise text is a legal presumption that will help determine the correct employment status of people working through digital platforms: ▪ Member States will introduce into their legal systems a legal presumption of an employment relationship, which will be triggered by facts indicating control and direction. ▪ These facts will be determined in accordance with national law and collective agreements, taking into account EU case law. ▪ Platform workers, their representatives or national authorities may invoke this legal presumption and claim misclassification. ▪ It is up to the digital platform to prove that there is no employment relationship.
Europe Votes for Supply Chain Directive	15.03.2024	On March 15, a majority of European Union member states voted in favour of a supply chain law. Among other things, the law aims to better protect workers and children from exploitation.
Bureaucracy Reduction Act: Proof of employment contract to be digital in future	21.03.2024	After lengthy negotiations within the coalition, the Federal Minister of Justice, Dr. Marco Buschmann, has now announced that the written form for the proof of the essential terms of a contract pursuant to Sec. 2 (1) sentence 1 of the New Contracts Act will give way to text form. In the future, it will be sufficient to provide evidence in digital form, e.g. by e-mail. Written proof of the contract should only be required at the employee's request.

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