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Employment Tracker

MARCH 2024

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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		
Extraordinary dismissal for feigning inability to be vaccinated	14.12.2023 - 2 AZR 55/23 -	**An employee in patient care who untruthfully asserts within the scope of Sec. 20a IfSG as amended on December 10, 2021, that a medical examination has determined that he cannot be vaccinated against the corona virus Sars-CoV-2 for the time being, is in material breach of an ancillary obligation under his employment contract.** *This was decided by the 2nd Senate of the Federal Labour Court on December 14, 2023, and the reasons for the decision were recently published.* Facts The Federal Labour Court had to decide whether the submission of a provisional vaccination certificate from the Internet could justify extraordinary termination. The plaintiff worked as a nursing assistant for the defendant employer. The defendant informed all employees that, pursuant to Sec. 20a (1) of the Infection Protection Act (IfSG), they must submit either proof of complete vaccination protection against the Corona virus, proof of recovery or a certificate of vaccination fitness. The plaintiff submitted to the defendant a certificate of provisional inoculation capability, which the plaintiff had acquired from the Internet against payment of a fee. There was no direct personal, telephone or digital communication with the doctor whose signature is printed on the certificate.

		Due to the defendant's conviction of the incorrectness of the submitted certificate, the defendant called in the health authority and, after hearing the works council, terminated the employment relationship extraordinarily, or alternatively extraordinarily with a social termination period. In her action, the plaintiff contests the extraordinary termination of her employment relationship. She is of the opinion that there is no extraordinary reason for termination. The defendant claimed that the plaintiff had deceived her by presenting a document that was obviously not based on a medical examination about a supposedly existing inoculation capability. This conduct irreparably destroyed the relationship of trust. Decision of the Federal Labour Court The Federal Labour Court ruled in favour of the employer and held that the disputed extraordinary termination without notice was valid. Where an employee working in a hospital falsely claimed to his employer that a medical examination had shown that he was temporarily unfit for vaccination, the employee was in serious breach of a secondary obligation under his employment contract. The conduct described is capable of constituting an important reason "per se" within the meaning of Sec. 626 (1) BGB. This applies irrespective of whether the employee assumed in non-technical language that he was in fact temporarily unfit for vaccination. It is also irrelevant whether the employee is liable to prosecution under Sections 277 et seq. of the German Criminal Code (StGB) for submitting a false health certificate. Rather, it is the breach of trust associated with the breach of the employment contract that is decisive.
Compensation for default of acceptance **Malicious failure to earn other income when accepting unpaid work**	24.01.2024 - 5 AZR 331/22 -	**Failure to earn money elsewhere is not only malicious if the employee deliberately remains inactive in the knowledge of the objective circumstances, namely the possibility of work, the reasonableness of the work and the disadvantages for the employer, but also if the employee deliberately settles for too low a salary in view of the employer's obligation to pay.**

This was decided by the Federal Labour Court on January 24, and the reasons for the decision were recently published.

Facts

In regards to claims for default of acceptance wages, the Federal Labour Court had to determine whether assuming unpaid activity constitutes maliciously failing to earn wages elsewhere.

The plaintiff served as the defendant's managing director until her termination and continued working as an employee with remunerated conditions afterwards.

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.

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.

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.

Decision of the Federal Labour Court

The Fifth Senate was unable to reach a final decision on the employer's appeal, and the case was sent back to the Regional Labour Court. Nevertheless, the decision provides valuable information:

The Federal Labour Court states that the principles of the secondary burden of proof must be applied if a managing director does not receive any remuneration for his activities, but

		only a profit-sharing commitment, provided that a connection between the limited partner's participation and the managing director's activities can be assumed. Furthermore, the Fifth Senate is of the opinion that the failure to earn money elsewhere within the meaning of Sec. 11 no. 2 KSchG is also malicious if the employee deliberately settles for too little remuneration in view of the employer's payment obligation. It is not necessary to intend to cause damage. It is sufficient if the employee deliberately disregards an opportunity for gainful employment of which he or she is aware. Negligent or even grossly negligent conduct is not sufficient.
Termination due to "resignation" from the Catholic Church **Submission to the ECJ**	01.02.2024 - 2 AZR 196/22 -	The Federal Labour Court has asked the Court of Justice of the European Union (ECJ) to interpret EU law on the question of whether an employer who is a member of the Catholic Church and does not otherwise require employees working for it to be members of the Catholic Church may terminate the employment relationship solely on the basis of the termination of membership of the Catholic Church if the employee leaves the Catholic Church during the employment relationship. *This was announced by the Federal Labour Court in a press release dated February 1, 2024.* Facts At issue is the validity of an extraordinary, or alternatively ordinary, termination of employment following an "ecclesiastical resignation". The plaintiff last worked for the defendant association in its pregnancy counselling centre. While on parental leave, she left the Catholic Church. Upon her return from parental leave, Defendant terminated Plaintiff's employment for cause or, alternatively, with notice because Plaintiff refused to re-join the Catholic Church. The defendant is under the ecclesiastical supervision of the diocesan bishop. According to its guidelines for pregnancy counselling, its purpose is to protect the unborn child and to encourage the woman to continue the pregnancy. At the time of the termination, the defendant employed four Catholic and two Protestant employees in the pregnancy centre.

		The plaintiff filed suit against the dismissal. She claimed that both the extraordinary and ordinary dismissals were invalid because they unlawfully discriminated based on religion. Both lower courts ruled in favour of the plaintiff. With the appeal to the Federal Labour Court, the defendant is pursuing its motion to dismiss. The decision of the Federal Labour Court The Federal Labour Court did not rule on the merits of the case, but stayed the proceedings and asked the Court of Justice of the European Union to answer questions on the interpretation of European Union law. The Court of Justice of the European Union must clarify whether the unequal treatment of the plaintiff with respect to employees who have never been members of the Catholic Church can be justified against the background of the protection against discrimination on grounds of religion, among others, guaranteed by Union law.
Mass dismissal notification **Ineffectiveness of dismissal as a sanction in the event of a breach of the obligation under Section 17 (1), (3) KSchG** **Referral to the ECJ**	01.02.2024 - 2 AS 22/23 (A) -	**In December, the Sixth Senate of the Federal Labour Court asked the Second Senate of the Federal Labour Court whether it would adhere to its legal opinion that a dismissal declared in the context of a collective redundancy is null and void if there is no or an incorrect notification of the collective redundancy pursuant to Sections 17 (1) and (3) of the German Unfair Dismissals Act at the time the dismissal is declared.** **The Second Senate has now stayed the proceedings and asked the Court of Justice of the European Union for a preliminary ruling on the interpretation of Sections 17 et seq. KSchG on the interpretation of the Collective Redundancies Directive.** *This was announced by the Federal Labour Court in a press release dated February 1, 2002.* Facts The parties are in dispute as to the legal consequences of the employer's breach of its obligations under Sec. 17(1) and (3) of the German Unfair Dismissals Act (KSchG).

		The plaintiff and 10 other employees were dismissed for operational reasons following the opening of insolvency proceedings against the employer's assets. At the time of the insolvency application, the employer had 25 employees. The plaintiff argued that the dismissal was invalid because the employer failed to provide the required notice of mass dismissal. Decision of the 2nd Senate of the Federal Labour Court The 2nd Senate stayed the proceedings and referred several questions to the Court of Justice regarding the interpretation of the Collective Redundancies Directive. In particular, the Second Senate wants to know whether a dismissal in the context of a notifiable collective redundancy can only terminate the employment relationship of an affected employee once the prohibition on dismissal has expired.
Exemption of a staff representative from the costs of classroom training	07.02.2024 - 7 ABR 8/23 -	**Under the Works Constitution Act (BetrVG), works councils are entitled to training that is necessary for the works council's work, the cost of which must be borne by the employer. This can include the cost of accommodation and meals for an external classroom seminar if the same training provider offers a webinar with the same content.** *This was decided by the 7th Senate of the Federal Labour Court.* *- Communicated by press release of 07.02.2024 -* Facts The parties are in dispute about the exemption of the costs for board and lodging when attending a classroom-training course. In particular, the Federal labour Court had to clarify whether the works council must allow itself to be referred to a possible webinar as part of the training required under Sec. 37 (6) BetrVG. The employer's works council informed the employer that it intended to send two members of the works council to a seminar on works constitution law in Binz/Rügen. For cost reasons, the employer referred to a nearby seminar or a webinar, which was even offered during the chosen period.

As a result, the staff representatives decided to attend a seminar in Potsdam, which cost the same as a nearby classroom seminar or webinar. After attending the seminar in Potsdam, the seminar organizer charged the staff representatives for accommodation and meals, which the employer refused to reimburse.

In their request, the staff representatives seek to be exempted from the costs of accommodation and meals. It is of the opinion that it should not be obliged to refer its members to a webinar pursuant to Sec. 37 (6) BetrVG, because the learning success of webinars is not as good as that of face-to-face events.

The employer argues that because participants feel more confident to ask questions and interact with other participants online, the learning effect of a webinar is higher. The better networking opportunities of a face-to-face seminar would have to be disregarded, as this is not directly related to the statutory duties of employee representation. In addition, "online learning" is common practice in the employer's company for continuing education.

The decision of the Federal Labour Court

The 7th Senate of the Federal Labour Court ruled in favour of the employee representatives. Just like a works council, staff representatives have a certain amount of leeway in deciding which training courses to send their members to. In principle, this includes the format of the training.

Even if the costs of a face-to-face seminar are generally higher than those of a webinar due to the need for overnight accommodation and meals, the employer cannot force the employee representatives to attend the webinar.

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		
Continued payment of wages due to coronavirus infection and official quarantine order	20.03.2024 - 5 AZR 235/23 -	It is 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 labour court dismissed the complaint. The Regional Labour Court affirmed in part. With its appeal to the Federal Labour Court, the defendant is pursuing its claim for dismissal.

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
Immigration of skilled workers: Tier 2 with Facilities for Experienced Professionals and Temporary Workers for Peak Periods	20.02.2024	The second stage of the new Skilled Migration Act will come into force on 1 March. This was announced by the Federal Employment Agency in two press releases (BA press releases no. 7 and 8 dated 20.02.2024). The following simplifications will apply as of March 2024: **Extension of the regulations for experienced workers** ▪ In the future, people with extensive professional experience will also be able to perform qualified work in Germany if they have a recognized professional or university degree obtained abroad and at least two years of professional experience. ▪ This also applies to non-regulated professions if the qualification is not yet recognized in Germany. ▪ Professional qualifications require at least two years of training. In addition, the annual salary must be at least 40,770 euros (2024) according to the current contribution assessment ceiling if the employer is not bound by a collective agreement. **Recognition partnership makes it possible to start the recognition procedure after entry** ▪ The Recognition Partnership offers foreign workers another opportunity to complete the entire recognition process in Germany. ▪ The employer and the prospective skilled worker undertake to apply for recognition after entry into Germany and to actively pursue the procedure. ▪ The basic requirements for the recognition partnership are an employment contract and a professional qualification of at least two years or a university degree recognized in the country of training. German language skills at level A2 are also required.

Short-term Contingent Employment

- The new regulation allows employers to hire foreign workers for up to eight months to cover bottlenecks during peak periods, for example in the hospitality industry or at airports.
- Vocational training or a university degree is not required.
- Requirements include domestic employment of at least 30 hours per week, the employer's commitment to a collective agreement and remuneration in line with the applicable collective agreement provisions, as well as the employer covering travel expenses.

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