

Luther.



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Inhalt

■ EDITORIAL

■ MAIN TOPICS

The use of AI in recruiting.....	4
The new active pension.....	6

■ THE TEN MOST IMPORTANT DECISIONS

Equal pay – pair comparison: adjustment to the top?	8
No standard values for the proportionality of a probationary period in a fixed-term employment	9
Integration of matrix managers into the company	10
Protection against dismissal during parts of parental leave.....	11
Reduction of a variable salary component with remunerative nature by act of law	12
Preferential treatment of works council members – Termination of a managing director.....	13
Provision of a company car as an impermissible benefit for a works council member.....	14
Minimum requirements for an internal job advertisement	15
Dismissal of a manager for breach of loyalty obligations in the run-up to restructuring.....	16
No unconscionability review of general terms and conditions only in the case of a general reference to a collective agreement.....	17

■ CURRENT DEVELOPMENTS IN PENSIONS

Drastic expansion of the importance of occupational pension schemes in the wake of the federal pension reform	18
---	----

■ INTERNATIONAL NEWS FROM UNYER

Austria: Private data on work computers – employers may “access” them if they have reasonable suspicion	20
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■ GENERAL INFORMATION

Authors of this issue	21
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■ EDITORIAL

Dear readers,

The first months of the year have already shown that employment law issues will remain highly relevant in 2026. A continuously strained economic climate and current global events are having a significant impact. In our first newsletter of the new year, we are once again bringing you updates on interesting developments and current issues in the employment law practice.

The use of artificial intelligence in the workplace is becoming increasingly relevant. We are witnessing a major turning point with far-reaching consequences. For employers, the potential applications of AI logically begin with the recruitment of new staff. Andre Schüttauf from our office in Essen has taken an in-depth look at the related questions of what role AI tools can play in the recruitment process and which legal aspects need to be considered.

Our second main article in this issue focuses on the 'other end' of working life: Elaine Tolksdorf from Hamburg outlines the framework for the new 'active pension', which offers tax benefits to older employees and allows for more flexible employment arrangements.

In our 'Ten Main Court Decisions', we once again summarise the key developments before the labour courts, ranging from the Federal Labour Court's latest ruling on pay transparency over recruitment in matrix organisations to preferential treatment for works councils. In this edition's international news from our unyer-partners, we take a look at our neighbours in Austria.

We hope you find this issue an engaging read and look forward to your feedback!

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 TOPICS

The use of AI in recruiting



Artificial intelligence (AI) is gradually finding its way into human resources, especially in recruitment processes. This trend is being reinforced by the shortage of skilled workers – more and more positions cannot be filled due to a lack of suitable applicants. AI tools can help here, but they are subject not only to data protection restrictions, but also to new rules under the AI Regulation – not to mention discrimination law.

Introduction

By using AI in the recruitment process, companies hope to identify suitable candidates more quickly and save time and personnel costs. Nevertheless, development in this area is slow in Germany. A survey commissioned by the digital association Bitkom revealed that AI is still hardly used in recruiting: only around 4 % of the companies surveyed use an AI chatbot, only 3 % use AI-supported competence or potential analysis, and only 1 % screen application documents with the help of AI or conduct job interviews using AI. Internationally, however, the use of intelligent applications in recruiting is much more widespread, especially in the US and China. The reluctance of German companies is mainly due to legal uncertainties.

Application scenarios

The possible applications of AI in recruiting extend to all steps of the process. These can be divided into external steps, i. e. those that applicants directly perceive (e. g. the job interview), and internal measures that the candidate does not perceive, such as the formulation of a job advertisement. AI can optimise job advertisements in such a way that their reach

and target group impact are improved. Systems then evaluate previous advertisements and their response and generate suggestions that are adapted to the context and requirements of the position. In addition, AI can analyse profiles in professional networks as part of “active sourcing” and identify suitable candidates in order to target them specifically.

The use of AI to structure incoming applications is widespread. AI-supported systems parse CVs and other documents, extract structured data (education, professional experience, skills) and convert it into a uniform format. Applicant data is compared with the requirements profile of the position to be filled or with those of existing employees to determine the degree of suitability. Typically, scoring systems then compare applicant data with the requirements of the position or with the profiles of existing successful employees and generate scores or rankings that determine who is invited, hired or rejected. In continuation of this analysis method, there are applications that evaluate the internet for additional information when applications are received. However, these are not widely used in Germany due to the associated legal risks.

AI can also support job interviews by generating personalised guidelines or questionnaires tailored to the position. This helps to conduct systematic, comparable and comprehensive interviews. There are also possible applications in the context of the interviews themselves: in theory, data sets in the form of video or audio tracks can be systematically recorded and evaluated with regard to the personality structure of applicants. Recently, there has also been a trend, particularly in the US, to identify applicants' characteristics using playful elements ("gamification"), in which reactions are examined.

Legal framework provided by the AI Regulation

On 1 August 2024, Regulation (EU) 2024/1689, known as the AI Regulation, the world's first set of standards for the regulation of AI, came into force. Since February 2025, the regulation has been gradually establishing binding and immediate standards for the use of AI in the EU. The core of the regulatory framework relates to so-called high-risk AI systems and includes a number of general obligations for providers and operators, which will apply from 2 August 2026. For high-risk AI systems already in operation before this date, a transition period until 2 August 2030 applies in accordance with Sec. 111 (2) AI Regulation. Its material scope is largely determined by the term "AI system", which is defined in its Sec. 3 (1). Analysis tools used by HR professionals to create personality profiles are generally covered by the definition, as are tools for optimising job advertisements, provided that the system is capable of adapting wording to the context and requirements of the position, even if only with limited autonomy.

Employers who use AI systems (in recruiting) are generally operators of these systems in accordance with Sec. 3 (4) AI Regulation. In exceptional cases, they may also be considered providers under its Sec. 3 (3), for example if their IT department develops an own application tool. The term "provider" distinguishes between an AI system and a so-called AI model for general use, which can perform a wide range of different tasks. Because of this distinction, it must be examined in each individual case what role the company plays with regard to the respective reference object. Annex III of the AI Regulation covers, among other things, AI systems that are intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, review or filter applications, and evaluate applicants. Systems that generate scores or rankings and are decisive for invitations, hiring or rejections will therefore regularly be classified as high-risk AI systems.

Operators must ensure that the AI system is used in accordance with the operating instructions and that operation is suspended in the event of risks to health, safety or fundamental rights. In addition, human supervision with sufficient AI expertise must be ensured, and the input data must be appropriate for the intended purpose and sufficiently representative. Operators also have information obligations towards applicants and employee representatives as soon as AI systems influence decisions affecting them.

Admissibility and limits based on the GDPR

The use of AI applications in the recruitment process typically involves the processing of personal data. The AI Regulation does not contain any independent grounds for permission. Rather, Sec. 2 (7) Sentence 2 AI Regulation explicitly clarifies that existing data protection provisions, in particular those of the GDPR, remain unaffected. Permission is therefore required under the GDPR, so that there are no differences from conventional selection procedures. In the context of AI, however, the focus is on the prohibition of automated decisions standardised in Art. 22 (1) GDPR, which precludes exclusively AI-based personnel selection. Fully automated hiring or rejection decisions are therefore generally inadmissible. A comprehensible human final decision remains necessary.

Risks of discrimination and the General Act on Equal Treatment

The use of AI also carries risks of discrimination that can lead to damages or reputational damage. Particularly problematic are distorted training data and seemingly neutral criteria that indirectly disadvantage certain groups. The employer remains responsible for a selection compliant with the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz – AGG), even if it uses AI systems or external service providers.

Involvement of the works council

The use of AI in recruiting regularly triggers the works council's participation rights, for example under Sec. 87 (1) No. 6 Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) for technical equipment for monitoring behaviour or performance and under Sec. 95 Works Constitution Act for selection guidelines, even if AI is used in their creation or application. In addition, the works council may call in an expert to assess AI in accordance with Sec. 80 (3) Sentence 2 Works Constitution Act.

Conclusion

Intelligent applications can be used at all levels of the application process. According to the AI Regulation, they are regularly classified as high-risk AI systems, for which certain provider and operator obligations apply. Selection processes typically involve the processing of personal data, which requires permission under the GDPR, whereby Art. 22 (1) GDPR prohibits automated decisions exclusively.

Furthermore, there are risks of discrimination that must be managed in light of the General Act on Equal Treatment.

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The new active pension

With the “active pension” introduced at the beginning of the year, the legislator is pursuing the goal of making greater use of the earning potential of older people, alleviating skills shortages and retaining valuable experience and knowledge in companies for longer. To this end, tax relief on remuneration in particular is intended to make continuing to work after reaching the standard retirement age more attractive.



Overview

The public debate so far has focused primarily on the new Sec. 3 No. 21 German Income Tax Act (Einkommenssteuergesetz – EStG), which allows employees to earn up to EUR 2,000.00 tax-free per month after reaching the standard retirement age. However, the changes to labour law are even more significant for employers: the newly introduced Sec. 41 (2) German Social Security Code VI (Sozialgesetzbuch VI – SGB VI) repeals the previous prohibition on prior employment for active pensioners in the case of fixed-term employment contracts without objective grounds. This gives companies the opportunity to continue employing experienced employees on a temporary basis without having to commit to them in the long term.

Termination of employment upon reaching the standard retirement age

Most employment relationships end automatically when the standard retirement age is reached. The reason for this is that many employment contracts and collective agreements provide for a corresponding fixed term. Such fixed terms are recognised under labour law because they enable a balanced age structure in the company and ensure reliable personnel planning (see, for example, BAG, decision of 14 August 2002 – 7 AZR 469/01). In practice, however, there is often a continuing need for the services of experienced employees, for example to complete ongoing projects or to train new employees. In such cases, Sec. 41 (1) Sentence 3 German Social Security Code VI already allows employment relationships to be extended beyond the standard retirement age by mutual agreement (so-called extension agreement). This can also be done several times.

Furthermore, various fixed-term instruments are already available under current law. In addition to the general fixed-term provisions in the Part-Time and Fixed-Term Employment Act (Teilzeit- und Befristungsgesetz – TzBfG), i. e. those with objective reasons (Sec. 14 [1] Part-Time and Fixed-Term Employment Act) and without (up to two years, Sec. 14 [2] Part-Time and Fixed-Term Employment Act), employment relationships with older job seekers who have reached the age of 52 can be limited to a maximum of five years under certain conditions (Sec. 14 [3] Part-Time and Fixed-Term Employment Act). However, fixed-term contracts without

objective reasons are excluded if an employment relationship with the same employer has previously existed (so-called prior employment prohibition).

The new Sec. 41 (2) German Social Security Code VI as a flexibility standard

Sec. 41 (2) German Social Security Code VI now repeals this prior employment prohibition for the employment of active pensioners. It does not apply if the conditions of Sec. 14 (2) Part-Time and Fixed-Term Employment Act are met and a maximum duration of eight years in total and a number of twelve fixed-term employment contracts are not exceeded. An employment contract can therefore be limited to a maximum of two years and extended up to twelve times, as long as the maximum term of eight years is not exceeded. In contrast to the previous regulation, the new regulation opens up the possibility of concluding a new employment contract, as it is not merely an extension of an existing employment relationship. This gives companies additional flexibility in continuing to employ experienced staff. Against this background, it stands to reason that Sec. 41 (2) German Social Security Code VI is not limited to continued employment with the same or previous employer. This is also confirmed by the government's explanatory memorandum to the law, according to which it should be made easier for people to return to their previous employer in particular (Bundestagsdrucksache 21/1929, p. 18).

Restart of the waiting period in the event of a temporary interruption

If a new employment contract is concluded after reaching the standard retirement age, the notice periods under German termination protection law may restart under certain circumstances. If there is an actual interruption of several weeks between the end of the previous employment relationship and the new contract, the waiting period pursuant to Sec. 1 (1) Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz – KSchG) generally starts again (Federal Labour Court, decision of 7 July 2011 – 2 AZR 12/10). For employers, this means greater flexibility: in the first six months of the new employment relationship, general protection against dismissal does not apply.

Conclusion of a new contract with amended working conditions

The option of concluding a completely new employment contract means that employers are not bound by the previous

conditions. This opens up considerable scope for flexibility, particularly with regard to reducing or making working hours more flexible and the associated adjustment of remuneration, the elimination of fringe benefits and adjustments to the area of responsibility.

Lower social protection for employees entitled to a pension

Active pensioners already have a pension entitlement and are therefore financially secured. Labour court case law recognises that employees entitled to a pension are generally considered to be less deserving of protection in the context of social selection in the event of redundancies for operational reasons (see, for example, Federal Labour Court, decision of 8 December 2022 – 6 AZR 31/22). The use of active pensioners – especially where an agreed ordinary termination option exists – therefore does not generally result in employees who are more deserving of social protection, in particular younger and more productive employees, being displaced in the context of staff reduction measures.

Notes on contract drafting

Despite the potential for flexibility outlined above, certain principles of labour law must still be observed when concluding contracts with active pensioners:

- **Written form requirement:** The fixed-term agreement must be in writing (Sec. 14 [4] Part-Time and Fixed-Term Employment Act).
- **Ordinary termination:** In order to maintain additional flexibility, it is advisable to expressly agree on an ordinary termination option in accordance with Sec. 15 (4) Part-Time and Fixed-Term Employment Act.
- **Term control:** Employers should ensure that the employment relationship actually ends when the fixed term expires in order to avoid an implied conversion to a permanent contract pursuant to Sec. 15 (6) Part-Time and Fixed-Term Employment Act.

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■ THE TEN MOST IMPORTANT DECISIONS

Equal pay – pair comparison: adjustment to the top?

An equal pay claim can be based on a single comparator of the opposite gender who performs the same or equivalent work and receives higher pay.

**Federal Labour Court (Bundesarbeitsgericht – BAG),
decision of 23 October 2025 – 8 AZR 300/24**

The case

The plaintiff is employed in a management position by the defendant employer and seeks financial equality with a male colleague named by her who also worked at the same management level as her. She justifies her claim on the grounds that the named colleague received higher remuneration and demands payment of wage differences amounting to over EUR 400,000 gross for the years 2018 to 2022 for basic salary, company bonus, share-based remuneration and company pension benefits. Alternatively, she claimed the difference between her salary and the average salary (median) of her male colleagues. The Labour Court partially upheld the claim, while the Higher Labour Court only awarded the plaintiff a claim for payment of the wage difference between the median salary of her female colleagues and that of her male colleagues for individual salary components.

The decision

The Federal Labour Court partially overturned the appeal ruling and referred the case back to the Higher Labour Court. The plaintiff had – in the first instance – sufficiently demonstrated that she was paid a lower remuneration than the named male comparator at her management level for work of equal value within the meaning of Sec. 4 (2) German Remuneration Transparency Act (Entgelttransparenzgesetz – EntgTranspG) and Art. 157 (1) of the Treaty on the Functioning of the European Union (TFEU). It was sufficient to use a person of the other gender as a benchmark (so-called pair comparison), even if the comparison group consisted of several persons. Such unequal treatment gave rise to a presumption that the discrimination was based on gender, in accordance with Sec. 22 General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz – AGG). A high probability of gender-based discrimination is not necessary in equal pay claims.



The defendant could refute the presumed violation of equal pay by proving that the jobs are not comparable or that the difference in pay is justified by objective factors unrelated to gender. Such factors could include, for example, performance deficits. The quality of work could be a permissible criterion for differentiation, which also included the assessment of so-called soft skills of managers. However, general assertions in this regard would not be sufficient. It would be necessary to demonstrate that performance deficits with regard to the respective remuneration component were in fact the reason for any differences in salary adjustments. If the employer cannot refute the presumption of gender discrimination, they are obliged to pay the remuneration that they paid to the comparator used in the pair comparison, regardless of the median remuneration.

Our comment

The ruling makes it clear that only minimal requirements are placed on the employee's submission in order to substantiate the presumption of pay discrimination. For employers, this results in the risk of losing equal pay proceedings – regardless of whether gender-based unequal treatment was actually intended. If the employer fails to refute the presumed gender-based discrimination, they may even be obliged to pay the remuneration that they paid to an individual comparison person, i. e. at the “very top” – not just an adjustment to the average remuneration of the comparison group of the other gender. As a result, remuneration systems and practices should be reviewed, objective criteria for differences should be established, and adequate documentation should be ensured. This also includes documenting the reasons for individual remuneration decisions. In doing so, the requirements of the Pay Transparency Directive (EU) 2023/970, which must be implemented by 7 June 2026, should be taken into account.

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No standard values for the proportionality of a probationary period in a fixed-term employment

There is no standard value (e. g. by percentage) for the proportionality of a probationary period to the duration of a fixed-term employment relationship as required by Sec. 15 (3) Part-Time and Fixed-Term Employment Act (Teilzeit- und Befristungsgesetz – TzBfG). Rather, the proportionality is determined by the length of the fixed term and the type of work.

**Federal Labour Court (Bundesarbeitsgericht – BAG),
decision of 30 October 2025 – 2 AZR 160/24**

The case

The plaintiff had been employed by the defending employer since 22 August 2022 on a fixed-term contract for one year. The probationary period was to last four months, during which time the employment contract could be terminated by either party with two weeks' notice. In addition, a general right of ordinary termination was provided for after the probationary period had expired. In a letter received on 10 December 2022, the defendant terminated the employment relationship with notice as of 28 December 2022. The plaintiff challenged this in her lawsuit, arguing that the agreed probationary period was disproportionately long. In her opinion, the possibility of ordinary termination pursuant to Sec. 15 (4) Part-Time and Fixed-Term Employment Act was also invalid due to the invalidity of the probationary period provision as a whole. The Labour Court and the Higher Labour Court considered the probationary period provision to be invalid, but affirmed the other ordinary termination provisions and determined the end of the employment contract to be 15 January 2023.

The decision

The Federal Labour Court dismissed the plaintiff's appeal, but partially upheld the defendant's cross-appeal. In the previous instance, the Higher Labour Court Berlin-Brandenburg (decision of 2 July 2024 – 19 Sa 1150/23) had ruled that a standard value of 25 % applied to the proportionality of a probationary period in

the case of fixed-term contracts. However, according to the Federal Labour Court, there is no such standard. The decisive factor is always a weighing of the individual case, taking into account the expected duration of the fixed-term contract and the type of activity, as stipulated in Sec. 15 (3) Part-Time and Fixed-Term Employment Act. Because the defendant had drawn up a detailed induction plan with three different phases lasting a total of 16 weeks, the court considered the probationary period of four months to be proportionate in relation to the fixed-term contract of over one year.

Our comment

At the end of 2024, the Federal Labour Court had already refrained from setting a generally applicable standard value in the form of a percentage for proportionality in this matter. Nevertheless, the probationary period in a fixed-term employment relationship is generally disproportionate if it corresponds to the total duration of the fixed term (BAG, decision of 5 December 2024 – 2 AZR 275/23). Even now, the court based its decision solely on the requirements of Sec. 15 (3) Part-Time and Fixed-Term Employment Act, i. e. the (expected) duration of the fixed term and the type of work. A longer probationary period is therefore more permissible for more demanding tasks that require a more intensive training – which, as in the present case, can be influenced by designing an induction plan for the probationary period. This plan may, for example, provide for work shadowing in various departments or familiarisation with different tasks. On the other hand, it is generally not permissible for the probationary period to last for the entire duration of the fixed-term employment relationship – whereby Sec. 622 (3) German Civil Code (Bürgerliches Gesetzbuch – BGB) already stipulates that it may not exceed six months in any employment relationship, whether fixed-term or permanent. Because according to Sec. 15 (4) Part-Time and Fixed-Term Employment Act ordinary termination of a fixed-term employment contract is only possible if it is expressly agreed, care must be taken to ensure that such a provision is integrated into the employment contract separately from a probationary period provision. If the two issues are linked and the length of the probationary period is disproportionate, the clause is otherwise subject to the risk of total invalidity, meaning that the option of ordinary termination is completely eliminated.

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Integration of matrix managers into the company

An allocation within the meaning of Sec. 99 (1) Sentence 1 Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) happens if a person is integrated into the work organisation of the company. It is irrelevant whether the person is in an employment relationship with the company owner. However, it is always necessary for the company owner to have – at least in part – the right to issue instructions regarding the content, location and time of the work, as is typical for an employment relationship.

**Federal Labour Court (Bundesarbeitsgericht – BAG),
decision of 23 September 2025 – 1 ABR 25/24**

The case

The parties are in dispute as to whether the employment of four employees constitutes allocation within the meaning of Sec. 99 (1) Sentence 1 Works Constitution Act, in which case the employer must involve the works council. The employer operates a business in Germany. It is part of an international group whose parent company is based in the US and has established cross-company and cross-country matrix structures. The four employees are not employed by the employer, but by a group company based abroad. However, they perform tasks in the employer's business from abroad via video conferences, in some cases also in the form of instructions to employees of the business. The works council requested that the employer be ordered under Sec. 101 Sentence 1 Works Constitution Act to revoke the appointments as long as the works council's consent had not been granted or replaced by a court order. The Labour Court and the Higher Labour Court upheld the requests.

The decision

The Federal Labour Court overturned the decision and referred the case back to the Higher Labour Court for further clarification of the facts. According to the principle of

territoriality, the Works Constitution Act is applicable in the present case, as it concerns the issue of employment in a domestic company. The fact that the employees concerned are based abroad does not generally preclude this. Furthermore, it was not necessary for the persons to be in an employment relationship with the owner of the establishment. However, the decisive factor for the existence of an allocation within the meaning of Sec. 99 (1) Sentence 1 Works Constitution Act was that the persons were actually integrated into the domestic establishment. This presupposes that the business owner has, at least in part, a right to issue instructions to the person concerned with regard to the content, place and time of work, which also applies to managers. To this end, it must be determined which specific work-related tasks the person performs and whether these can be regarded as jointly achieving the "work-related" purpose of the business together with the employer's employees.

A general reference to the existence of a "technical" right to issue instructions is not sufficient, as this is not a fixed legal term. All circumstances of the individual case are decisive in the overall assessment to be made. However, it is generally not decisive how often the relevant activities are performed, how much time they take and from which location they are performed.

Our comment

The decision clarifies for the first time the controversial legal question of under what conditions employees in cross-company and cross-country matrix organisations can be integrated into a domestic business. It follows on from the decision of the Federal Labour Court of 22 May 2025 – 7 ABR 28/24 (presented by Schreiner/Corzelius in our Newsletter 4-2025), according to which matrix managers may be eligible to vote in works council elections in several establishments at the same time in accordance with Sec. 7 Sentence 1 Works Constitution Act. This establishes a uniform line of case law regarding the requirements for the integration of employees into a company, even if this is, of course, very broad and depends on the details.

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Protection against dismissal during parts of parental leave

The grace period for partial periods of parental leave determined in advance applies not only before the start of the first period, but also before the start of each subsequent period.

Higher Labour Court Hamm (Landesarbeitsgericht – LAG Hamm), decision of 5 November 2025 – 11 SLa 394/25

The case

The plaintiff, who had been employed by the defending employer since 1 July 2024, requested parental leave on 23 July 2024. He wanted to spread this over four periods, with the second period running from 11 November 2024 to 10 July 2025. At the beginning of August 2024, the defendant approved the request, but in a letter dated 9 October 2024, he terminated the employment contract before the start of the second period within the probationary period with effect on 31 October 2024. The plaintiff then filed an action for unfair dismissal, invoking the special protection against dismissal provided for in Sec. 18 (1) Sentence 2 No. 1 Federal Parental Allowance and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz – BEEG). The defendant argues that the protection period only applies when parental leave is determined and is not triggered anew before each partial period. The Labour Court upheld the action.

The decision

The Higher Labour Court Hamm dismissed the defendant's appeal. The termination was invalid because it was issued before the second period of parental leave despite the ongoing grace period. The provision of Sec. 18 (1) Sentence 2 No. 1 Federal Parental Allowance and Parental Leave Act applies before the start of each part of parental leave. The law refers vaguely to "one" period of parental leave. It follows from this that protection against dismissal is not limited to a specific period of parental leave. In addition, Sec. 18 (1) Sentence 2 No. 1 and No. 2 Federal Parental Allowance and Parental Leave Act uses the conjunction "and", which suggests that protection against dismissal applies multiple times. Furthermore, a uniform interpretation of Sec. 18 (1)



Sentence 1 and Sentence 3 Federal Parental Allowance and Parental Leave Act shows that protection against dismissal exists during the individual periods. The purpose of the entire provision is to protect employees from dismissal due to taking parental leave. This risk is greatest before the first period. However, taking further periods of parental leave means greater replacement costs for the employer. A reference to Sec. 612a German Civil Code (Bürgerliches Gesetzbuch – BGB) for the further periods is unreasonable and contrary to the system. There is no evidence of a legislative intention to treat several requests for parental leave differently, insofar as this is permissible. Due to the time limit on the protection period and the requirement for the employer's consent, there is also no risk of abuse through the targeted distribution of parental leave. The appeal was allowed and lodged (reference at the Federal Labour Court: 2 AZR 213/25).

Our comment

The decision is to be agreed with. The Higher Labour Court emphasises that the Federal Parental Allowance and Parental Leave Act reflects the respective interests of employers and employees. If the employer voluntarily agrees to the requested distribution of parental leave over more than the three periods provided for by law, it must be measured against this. There can then be no question of an abusive extension of protection against dismissal. Employers are advised to thoroughly review requests for parental leave and to consider the consequences, particularly with regard to the employee's employment with reduced hours and their replacement. This applies all the more the more fragmented the parental leave is.

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Reduction of a variable salary component with remunerative nature by act of law

If a variable remuneration component is purely performance-related, the entitlement to it for periods of incapacity to work outside the continued payment of remuneration already lapses ipso jure.

**Federal Labour Court (Bundesarbeitsgericht – BAG),
decision of 2 July 2025 – 10 AZR 193/24**

The case

The plaintiff employee has been employed by the defending employer, an insurance company, since 2003. He works in a sales team and primarily looks after agency partners. The defendant has a general works agreement on remuneration, which regulates a fixed salary and a variable remuneration component for the (total) target income. The latter is based 50 % on the achievement of production targets in the team and 50 % on the previous year's results. Irrespective of this, a minimum income is determined, for which the defendant pays a monthly advance.

The version of the general works agreement valid until the end of 2019 contained a provision according to which both remuneration components could be reduced for periods in which there was no entitlement to continued payment of remuneration. This provision is no longer included in the version valid since the beginning of 2020. In April 2021, the parties concluded a target agreement for the current year. From mid-May onwards, the plaintiff was unable to work due to illness for 191 days, 149 of which were without entitlement to continued remuneration. In the final settlement for 2021, the defendant deducted EUR 12,951.08 from his total earnings of EUR 31,291.20 for these periods, which the plaintiff then claimed in court. The Labour Court and the Higher Labour Court dismissed his claim and appeal respectively.

The decision

The Federal Labour Court ruled similarly. Because the variable remuneration component was also reciprocal with the plaintiff's work performance and he had no entitlement to remuneration

for the relevant period after the end of the six-week period pursuant to Sec. 3 (1) Continued Remuneration Act (Entgeltfortzahlungsgesetz – EFZG), the defendant was entitled to take his periods of incapacity for work outside the continued remuneration period into account in reducing his entitlement. For periods without work performance, the entitlement to remuneration does not apply according to the principle of “no work, no pay”. This also applies to a variable remuneration if it represents a salary purely related to work performance. Such remuneration is only to be continued without actual work being performed if this is regulated by law, collective agreement or in any other way, e.g. in accordance with Sec. 3 Continued Remuneration Act in the event of incapacity to work due to illness. An explicit (contractual) reduction rule is not required for this, as the loss of entitlement to consideration arises from the law. The fact that the general works agreement no longer contained a reduction provision is irrelevant. The payment in question here is of a remuneration nature, as demonstrated, among other things, by the linking of the two salary components to form a uniform income. In addition, the court clarified that although this was a performance-related payment intended to reflect the sales success of the plaintiff's team, only those who contributed to this through their work were entitled to remuneration.

Our comment

In a parallel decision to the present ruling, the Federal Labour Court confirmed that the reduction of variable remuneration is also permissible for periods of parental leave and does not require an explicit reduction provision (Federal Labour Court, decision of 2 July 2025 – 10 AZR 119/24). The situation is somewhat different for the (equally possible) reduction of holiday entitlements during parental leave pursuant to Sec. 17 (1) Federal Parental Allowance and Parental Leave Act (Bundeselterngeld- und elternzeitgesetz – BEEG), which the employer must declare in some form, even if only through the reduction itself (see, for example, Federal Labour Court, decision of 19 March 2019 – 9 AZR 362/18). In the case of special benefits that are not purely remuneration-related, a reduction in the event of incapacity to work pursuant to Sec. 4a Continued Remuneration Act is only possible by means of an agreement to that effect, because the payment is not (completely) reciprocal with the work performance. A unilateral reduction by the employer is not possible.

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Preferential treatment of works council members – Termination of a managing director

An unlawful preferential treatment of works council members through the granting of allowances or higher pay grades justifies the summary dismissal of a managing director if the latter approves or tolerates such practices.

Higher Regional Court Frankfurt am Main (Oberlandesgericht – OLG Frankfurt am Main), decision of 20 November 2025 – 5 U 15/24

The case

The plaintiff had been employed by the defending employer, a municipal transport company, since 1994. In 2014, he became its managing director. Thereupon, several works council members and a representative for severely disabled employees received exceptionally rapid and substantial salary increases and higher pay grades. The plaintiff had co-signed the relevant managing director resolutions and salary commitments, in some cases under sole responsibility for personnel. Following anonymous reports of irregularities, the city administration initiated a special audit, with the chairman of the defendant's supervisory board also commissioning a law firm to investigate. All members of the supervisory board responsible for appointing and dismissing the managing director were given access to the resulting reports on 26/27 February 2022, as was the plaintiff. On 7 March 2022, the supervisory board heard him on the allegations and subsequently decided to terminate his contract without notice, which was declared on 8 March 2022. The plaintiff then asserted the invalidity of this termination and claimed bonus and remuneration payments.

The decision

As previously done by the Regional Court Wiesbaden, the Higher Regional Court Frankfurt am Main also considered the termination to be valid. The decisive factor was that the plaintiff had participated in the inadmissible favours or had failed to prevent them for years in breach of his duties. This constituted a violation of the prohibition of favouritism under

Sec. 78 Sentence 2 Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) in conjunction with Sec. 179 (2) German Social Security Code IX (Sozialgesetzbuch IX – SGB IX) and a breach of his duties of legality, supervision and loyalty as managing director. All of this constituted good cause within the meaning of Sec. 626 (1) German Civil Code (Bürgerliches Gesetzbuch – BGB), especially since it was a case of systematic misconduct over a long period of time and the defendant's trust had been irrevocably destroyed. The two-week period specified in Sec. 626 (2) German Civil Code had been observed because it depended on the knowledge of the supervisory board as a collegial body, and the supervisory board had only obtained the necessary reliable knowledge of the facts after evaluating the investigation reports. As long as the measures deemed necessary to clarify the facts of the case were still being carried out, in particular the hearing of the opposing party, the two-week period could not begin. Finally, the plaintiff is not entitled to fixed remuneration beyond 8 March 2022. However, the court largely upheld his bonus entitlement for 2021.

Our comment

The inadmissible favouring of works council members is an important reason for extraordinary termination. The same applies to a breach of the duty of supervision in this context. Even in the case of departmental responsibility, a managing director has a duty to control and supervise the co-managing director. The Higher Regional Court follows the Federal Court of Justice in this regard, stating that if the various management tasks are distributed among several managing directors, the so-called management duty changes from a duty to perform the task with due care to a duty to supervise the respective departmental managing directors. However, this duty of supervision generally only requires specific measures to be taken on a case-by-case basis, such as making enquiries, requesting documents, raising the issue in general management meetings or involving control bodies within the company (see, for example, Federal Court of Justice, decision of 23 July 2024 – II ZR 206/22). It is therefore always advisable for members of executive bodies, even where there is a horizontal distribution of tasks, to keep an eye on the practice of works council remuneration and to be alert to conspicuous patterns and possible circumvention of control systems.

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Provision of a company car as an impermissible benefit for a works council member

The provision of a company car for private use to a works council member constitutes an impermissible benefit pursuant to Sec. 78 Sentence 2 Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) if it is granted on the basis of the exercise of works council duties.

Higher Labour Court Lower Saxony
(Landesarbeitsgericht – LAG Niedersachsen), decision
of 3 November 2025 – 15 SLa 418/25



The case

The defending employer had a social counselling service in which only works council members could work. The defendant only allowed its works council members to complete training as social counsellors and to take on the role on a voluntary basis. Works council members working as social counsellors were provided with a company car for this role, which they were also allowed to use privately. A company car agreement was concluded for each of them. The plaintiff was an exempt works council member at the defendant's company and had taken on such a role as a social counsellor on 1 July 2016. Accordingly, she also received a company car. After the

defendant outsourced the social counselling service to an external provider in 2024, the plaintiff's role as a social counsellor ended, which is why she also had to return her company car. She sued for financial compensation for the loss of private use. The Labour Court dismissed the claim.

The decision

Similarly, the Higher Labour Court Lower Saxony ruled that the plaintiff had no claim against the defendant for the provision of a company car for private use and was therefore not entitled to compensation for loss of it. The company car had been provided to the plaintiff for her work as a social counsellor. This work at the defendant's company had been reserved exclusively for works council members. The plaintiff's employment contract did not provide for a company car, which is why the private use of the company car constituted an inadmissible benefit due to her works council activities. The plaintiff had only received this benefit because of her position. The plaintiff could not base her claim on the company car agreement, as this also violated the prohibition of preferential treatment under Sec. 78 Sentence 2 Works Constitution Act and was therefore void under Sec. 134 German Civil Code (Bürgerliches Gesetzbuch – BGB).

Our comment

Unlawful benefits for works council members can take the form not only of excessive remuneration, but also of material or immaterial advantages. The treatment of works council members should therefore always be critically reviewed in order to prevent both advantages and disadvantages. Whether a works council member may be granted a company car for private use depends on whether this is related to their employment contract. If private use were to be denied in this case precisely because of the works council position, this would in turn constitute impermissible discrimination, which is also prohibited under Sec. 78 Sentence 2 Works Constitution Act. However, if the works council's activities involve a lot of travel, a company car may also constitute a material resource necessary for the works council's activities within the meaning of Sec. 40 (2) Works Constitution Act. In this case, the employer fulfils its legal obligation to bear the costs and material expenses of the works council by providing the car.

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Minimum requirements for an internal job advertisement

An internal job advertisement pursuant to Sec. 93 Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) must contain at least, in addition to the qualifications expected of applicants, a brief description of the tasks associated with the position and the number of working hours.

**Federal Labour Court (Bundesarbeitsgericht – BAG),
decision of 23 September 2025 – 1 ABR 19/24**

The case

The employer involved in the proceeding operates several hospitals. A senior physician already employed at one of its clinics applied for a position advertised by the employer. The job advertisement did not specify the working hours. In light of this, the employer consulted the works council on the (partial) transfer in accordance with Sec. 99 (1) Works Constitution Act, but did not inform the works council about the possible closure of a hospital department as a result of the (partial) transfer. The works council refused to consent to the transfer, citing Sec. 99 (2) No. 5 in conjunction with Sec. 93 Works Constitution Act, on the grounds that the internal job advertisement did not contain any information about the effects of the planned transfer on the business and on its suitability as a part-time position. The employer then applied for judicial approval pursuant to Sec. 99 (4) Works Constitution Act. The Labour Court granted the application, but the Higher Labour Court upheld the works council's appeal.

The decision

The Federal Labour Court also rejected the application for substitution of consent. The works council was entitled to refuse consent pursuant to Sec. 99 (2) No. 5 Works Constitution Act in conjunction with Sec. 93 Works Constitution Act because the employer had not adequately advertised the position to be filled. At the request of the works council, vacancies within the company must be advertised in accordance with Sec. 93 Works Constitution Act. The form and content are at the employer's discretion, as long as no



agreement with the works council on these aspects exists. The minimum information required includes a brief description of the tasks associated with the job and the qualifications expected of applicants. This contains information on the number of working hours required for the position to be filled, as this information is typically an essential factor for interested applicants. If, on the other hand, an employer wishes to advertise a position with no specified working hours and leave it to the applicants to negotiate the working hours, this must also be expressly stated. In the absence of information on the number of working hours, the job advertisement did not meet the requirements of Sec. 93 Works Constitution Act. The lack of information about the possible closure of the department did not constitute grounds for refusing consent, as this had nothing to do with the individual personnel measure.

Our comment

Employers should ensure that all job advertisements clearly state the terms and conditions of the employment contract. In particular, the working hours for the positions to be filled should be clearly indicated. It is advisable to specify whether the position is full-time or part-time, together with the number of hours per week, in case this has already been determined. If the working hours are to be negotiated individually between the applicant and the employer, this must also be stated in the job advertisement. In not providing information on working hours, employers risk that works councils will block appointments and transfers and that approval will not be replaced by a court.

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Dismissal of a manager for breach of loyalty obligations in the run-up to restructuring

Managers with staff responsibility may be obliged, in the context of operational restructuring, to refrain from measures such as suggesting or approving parental leave applications that could impair the employer's position in negotiations on the reconciliation of interests or social plans, as well as in the run-up to dismissals.

Higher Labour Court Düsseldorf (Landesarbeitsgericht – LAG Düsseldorf), decision of 14 May 2025 – 4 SLa 539/24

The case

The plaintiff had been working as a team leader with staff responsibility at a pharmaceutical company since 2013. In mid-February 2024, he was informed that his division was to be closed on 31 May 2024. The information was expressly communicated as confidential, and the workforce was not to be informed until the end of February. Following, the plaintiff approved several requests from his team members, such as parental part-time work, early return from parental leave to full-time work, and changes to existing "flexible part-time" agreements. He also suggested to one employee to apply for parental (part-time) leave, sent others links to the relevant forms, and forwarded job advertisements from other companies. Furthermore, he provided an employee with his own severance pay calculation based on a works agreement and informed a colleague about the planned closure of the department. The employer considered this to be a serious breach of loyalty, consideration and confidentiality obligations and terminated the plaintiff's employment without notice, alternatively with notice. The Labour Court upheld his action for unfair dismissal.

The decision

The Higher Labour Court Düsseldorf upheld the decision. Managers with staff responsibility are subject to an increased duty of loyalty during restructuring. In particular, they may not



promote or approve personnel measures that could worsen the employer's negotiating position. In the event of conflicts of interest, the interests of the company must always be given priority. This could also apply to requests for parental (part-time) leave if there is no longer any need for employment due to a planned closure of the business and the employer faces financial disadvantages. Deliberate collusion with employees could in itself constitute good cause for extraordinary dismissal. However, these conditions were not met in this case. It could not be established that the plaintiff had deliberately violated his ancillary obligations. Neither the recommendation to apply for parental (part-time) leave nor the timing of the approval of corresponding applications proved collusive behaviour. With regard to the disclosure of confidential information and the sending of external job offers, a warning would have been necessary as a milder measure.

Our comment

The decision makes it clear that even conduct which in itself is sufficient to justify termination without notice pursuant to Sec. 626 (1) German Civil Code (Bürgerliches Gesetzbuch – BGB) must always be assessed on a case-by-case basis. A comprehensive weighing of interests, taking into account possible milder means of response, remains decisive. The collusive cooperation between managers and employees can be taken into account to the detriment of an employee when weighing up interests in the context of dismissal and can aggravate a breach of duty (Federal Labour Court, decision of 13 December 2018 – 2 AZR 370/18).

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No unconscionability review of general terms and conditions only in the case of a general reference to a collective agreement

Provisions of a collective agreement referred to in an employment contract are only exempt from an unconscionability review if the reference extends to the entire collective agreement. A reference only to certain provisions or parts of it is not sufficient.

**Federal Labour Court (Bundesarbeitsgericht – BAG),
decision of 2 July 2025 – 10 AZR 162/24**

The case

The plaintiff was employed as a paramedic by the defending employer. A reference in the employment contract stipulated that the employment relationship should be governed by a specific tariff agreement. However, the contract contained deviations from the tariff agreement's provisions on some issues. According to the tariff agreement, employees receive an annual bonus if they are in an ongoing employment relationship on 1 December. The bonus is paid with the November salary. Employees who leave the employment relationship on their own initiative by 31 March of the following year must repay the bonus. At the beginning of 2022, the plaintiff terminated his employment contract as of 31 March 2022. Referring to the repayment clause in the tariff agreement, the defendant reduced the plaintiff's salary from January to March 2022 by one third of the bonus payment in each case. The plaintiff then demanded the amounts deducted. The Labour Court dismissed the action, but the Higher Labour Court upheld it.

The decision

The Federal Labour Court confirmed this ruling. The plaintiff's claim for the months of January to March 2022 was not (partially) extinguished by offsetting because the defendant had no claim to repayment of the bonus. Although the requirements of the repayment provision in the tariff agreement were met, this clause, which the defendant had made a general term and condition by reference, did not stand up to a review of its content because the tariff agreement provisions were

not referred to comprehensively. This is evident from the fact that certain provisions deviate in content from those in the collective agreement. Because the collective agreement was not referred to in its entirety, the review of the appropriateness of the repayment clause referred to in the contract was not excluded under Sec. 310 (4) Sentence 3 German Civil Code (Bürgerliches Gesetzbuch – BGB) in conjunction with Sec. 307 (3) German Civil Code. The control privilege stipulated therein requires reference to the entirety of the provisions of a collective agreement. Only this is suitable for establishing the presumption of appropriateness underlying the control privilege. This also applies if the limited reference relates to closed areas or complexes of provisions that are related in terms of subject matter and content.

Collective agreements are exempt from an unconscionability review pursuant to Sec. 307 (4) Sentence 1 German Civil Code because they are expected to be appropriate due to the presumed parity of bargaining power between the parties to the collective agreement. However, only the entirety of the provisions of a collective agreement justifies the presumption that it adequately balances the diverging interests. The repayment clause here is therefore subject to an unconscionability review. Since the annual bonus is also remuneration for work performed, it cannot be made dependent on further conditions and purposes such as a certain future loyalty to the company. The repayment provision is therefore unreasonably disadvantageous and invalid.

Our comment

A partial reference in an employment contract to certain collective agreement remains possible in itself, but the provisions referred to are then subject to review under the law governing standard terms and conditions – which has consequences, particularly in the case of cut-off date or repayment clauses, as these cannot be linked in individual contracts to special benefits that are fully or partially remunerative in nature (Federal Labour Court, decision of 27 June 2018 – 10 AZR 290/17). An intended general reference fails if certain collective bargaining provisions are modified in the employment contract. In order to maintain the control privilege, it is therefore necessary to refer to an entire collective agreement, which can also be a pure tariff agreement on remuneration.

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■ CURRENT DEVELOPMENTS IN PENSIONS

Drastic expansion of the importance of occupational pension schemes in the wake of the federal pension reform

In his speech on 2 February 2026 at the New Year's reception of the German Stock Exchange, Chancellor Friedrich Merz announced that occupational pension schemes will play a much greater role in old-age provision than before. It is therefore important for every employer to keep track of these developments and set the right course for their own company.



The Chancellor said the following:

“We have set ourselves a very comprehensive reform agenda, not least a reform of our pension systems. We have already decided to strengthen occupational pensions, as well as the active pension, which came into force on 1 January 2026. But before the end of 2026, we will launch a comprehensive pension reform, including a rebalancing of the three pillars of our pension system in relation to each other. Statutory pension insurance will remain, but it will only be one component of a new overall pension system in which private pension provision and occupational pensions will play a much greater role than before. At this point, I would like to take the opportunity to express my gratitude to our Social Democratic coalition partner. This discussion was not easy. But recognising that private and occupational pension schemes, both of which are funded, should play a

much greater role in the overall pension provision for our population, was a long way for the Social Democrats to go. We have already agreed on this in the coalition agreement, and over the course of the year we will turn it into a sensible reform that addresses precisely this issue, namely strengthening funded private and occupational pension schemes. This is a paradigm shift in the German pension policy. It will also trigger a significant growth spurt for the capital market in the country. Above all, it will ensure that a much larger proportion of employees in Germany participates in the growth of our wealth, our national wealth.”

The major trade unions, led by ver.di, support this development. In the invitation to a ver.di event in early March, at which speakers included Chairman Frank Werneke, Federal Minister of Labour Bärbel Bas and

President of the German Pension Insurance Fund Gundula Roßbach, ver.di explained the trade unions' new perspective:

“More and more people are at risk of poverty in old age. The statutory pension alone is not enough to secure their standard of living. What can and must be done? What are ver.di's demands and ideas? In addition to statutory pension insurance, occupational pension schemes are playing an increasingly important role. We consider them to be the better alternative to private pension schemes, which focus more on asset accumulation than on providing security in old age. And not only because occupational pension schemes offer the possibility of involving employers in the financing to a significant extent. Organised in large collectives based on social partnership, they are more cost-effective and profitable.

Why, then, do not have more employees – especially those in the lower and middle income brackets and in small and medium-sized enterprises – with occupational pension schemes?”

All these statements show that the reform of old-age provision is increasingly taking shape, prompting many employers to carefully review their existing or planned occupational pension schemes.

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Advertisement: Training your own managers and administrators in occupational pension schemes

Many companies want their HR or finance staff to have a solid basic knowledge of occupational pension schemes. However, acquiring this knowledge is not easy. A good option is to attend the two-part, eight-day course offered by Management Advisory Heidelberg (MAH, www.mah-advisory.de). The course concludes with an examination at the Chamber of Industry and Commerce (Industrie- und Handelskammer – IHK) and leads to the title of “bAV Spezialist (IHK)”.



The certificate course provides participants with the necessary basic knowledge of occupational pension schemes, particularly from a labour law and tax law perspective, to enable them to advise and support companies and their employees. In addition to a basic introduction to occupational pension schemes, participants are provided with in-depth specialist knowledge that is necessary for the day-to-day practice of occupational pensions. Luther supports this MAH training course and provides the lecturers for large parts of the seminar. Employees of our clients receive a discount on the course fee. If you are interested, please contact us or Ms Simone Gerrits from MAH Advisory (gerrits@mah-advisory.de).

■ INTERNATIONAL NEWS FROM UNYER

Austria: Private data on work computers – employers may “access” them if they have reasonable suspicion

Can an employer search an employee’s work computer, even if it contains private files? The Austrian Data Protection Authority has clearly answered this question in the affirmative – at least in cases of justified suspicion of breaches of duty – in its decision of 4 September 2025 (reference: 2025-0.178.139).



In the underlying case, a long-standing employee of a Salzburg-based airline had been dismissed and suspended from duty following repeated complaints about significant shortcomings in his work performance. In order to investigate the allegations and ensure business continuity, the employer inspected his work computer. This revealed numerous private contents, including intimate photographs, family photos, application documents and credit card statements. This data was used as evidence in the subsequent dismissal appeal proceedings. There was no company policy on the private use of work computers.

The Austrian Data Protection Authority rejected the employee’s complaint on the grounds of violation of his right to confidentiality, information and erasure. In weighing up the interests pursuant to Art. 6 (1) (f) GDPR, it concluded that, given the specific circumstances of the case, the employee had to expect his work computer to be examined, especially since he had stored the data there himself. The processing of particularly sensitive data within the meaning of Art. 9 GDPR

was also permissible, as it was necessary for the assertion or defence of legal claims. Even labelling folders as “private” would not have made access inadmissible per se in the event of reasonable suspicion.

The decision shows that clear IT guidelines are not a “nice-to-have” in a company, but rather a matter of active compliance. Those who define responsibilities, boundaries and processes in advance can act effectively in cases of suspicion and have secure legal arguments for potential disputes.

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■ GENERAL INFORMATIONS

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