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Labour & Employment Law Newsletter

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unyer GLOBAL ADVISORS

Content

Dear Readers,

Summer is finally here! The most beautiful time of the year lies ahead of us. We can enjoy spending time by the sea or in the mountains. What could be better than putting together the best holiday reading for your vacation. Our Labour & Employment Law Newsletter is your perfect choice if you wish to follow the current labour law topics and keep up to date. In this issue, we again look at the changing world of work.

The topic of recording working time has been a major talking point at least since the decision of the Federal Labour Court in September 2022. The Court of Justice of the European Union had already set out the requirements for recording working time in 2019. Pressure on legislators was mounting, and all eyes were on Berlin. The draft bill for the amendment of the German Working Time Act has now been published. However, it fails to live up to expectations. Whether the draft bill makes it into the legislative process in this form remains to be seen. Dietmar Heise and Janina Ott take a critical look at the draft bill in our current issue and provide their initial views.

One act that is just around the corner, however, is the new Whistleblower Protection Act. Here, too, the national legislator was behind schedule, as the European directive, on which the Act is based, should have been implemented a long time ago. However, after a lengthy legislative process, the day has now come: the Whistleblower Protection Act will enter into force on 2 July 2023. It demands the undivided attention of employers, as it not only concerns the protection of whistleblowers from reprisals, but also requires the implementation of reporting systems to enable whistleblowing in the first place. Dr Astrid Schnabel, Sandra Sfinis and Martina Ziffels provide an initial overview of the main points of the Act in terms of labour law, while Silvia C. Bauer and Dr Stefanie Hellmich address the topic from the perspective of data protection law.

In the area of company pension plans, we address in this issue the question of the appropriateness of the compensation of corporate officers, managers, and other exposed authorised representatives of companies. In particular, mistakes can be made in structuring pension commitments, which can lead to serious consequences for the company and the decision-makers involved. In his article, Jan Hansen therefore outlines the key criteria that companies must consider when structuring pension commitments.

In this issue, we again present our international newsflash from Unyer, which the Austrian law firm KWR joined in March 2023. Reason for us to have a look at Austria. In this issue, Dr Anna Mertinz of KWR in Vienna reports on a recent decision of the Austrian Supreme Court of Justice on dismissals due to illness. Caroline Ferté from the law firm FIDAL, our French Unyer member, sheds light on the much-discussed model of the four-day working week from a French perspective.

Naturally, we will also focus on the latest case law developments in this newsletter. We have again selected cases that we hope will be of particular interest to you. As always, we look forward to receiving your feedback on our topics. Please feel free to contact us directly if you have any suggestions or questions.

We wish you a pleasant summer and hope you enjoy reading this issue.

Yours,

Achim Braner

Draft bill on the recording of all working time: minimalism and missed opportunities

On 27 March 2023, the Federal Ministry of Labour and Social Affairs published the draft bill on the amendment of the Working Time Act and other regulations (hereinafter: "RefE-ArbZG"). The Act adopts the requirements that the Federal Labour Court had set forth last year in its interpretation of the Occupational Safety and Health Act (decision of 13 September 2022 - 1 ABR 22/21) and with which the Erfurt judges had already followed a previous ruling of the Court of Justice of the European Union (judgment of 14 May 2019 - C-55/18). The proposed legislation is not likely to be a great success, as it constitutes a minimalist regulation of what is absolutely necessary. The Federal Ministry of Labour and Social Affairs has therefore probably missed the opportunity to adapt the now 29-year-old Working Time Act to new developments in practice and technology.

I. The RefE-ArbZG

1. Content of the RefE-ArbZG

The RefE-ArbZG regulates the employer's obligation to record the beginning, end and duration of working time. In addition to a regulation on the recording of working time in the case of trust-based working time, the employee's right to information and the employer's duty to retain records, the RefE-ArbZG also contains a collective agreement opening clause, which allows further exceptions to be made regarding the recording of working time by the parties to the collective bargaining agreement. Lastly, transitional provisions are codified and companies with up to ten employees are exempted from the obligation to record working time electronically. Violations of the obligation to record working time are subject to fines under Section 22 (1) Nos. 9 and 10 RefE-ArbZG.

It is obvious that the Federal Ministry of Labour and Social Affairs wants to ensure that working time is recorded for all employment relationships. Therefore, it also inserts almost identical provisions into the Youth Employment Protection Act (*Jugendarbeitsschutzgesetz*, JArbSchG). Exotic areas of law such as the Offshore Working Time Ordinance and the Inland

Waterways Working Time Ordinance are also to be amended. The general regulation is to replace Section 16 (2) of the Working Time Act (*Arbeitszeitgesetz*, ArbZG) which until now stipulated that time worked in excess of eight hours be recorded. The regulation for young people is to become a new Section 49a in the JArbSchG. However, in its decision of 13 September 2022, the Federal Labour Court derived the comprehensive obligation to record time from Section 3 (2) No. 1 of the Occupational Safety and Health Act (*Arbeitsschutzgesetz*, ArbSchG). Although the draft bill does cite the reference, it does not contain any information concerning the relationship between the two provisions. It is by no means obvious that Section 3 (2) No. 1 ArbSchG will now no longer contain the obligation to record working time. We will come back to this issue later.

a) Employer's obligation to record working time

Pursuant to Section 16 (2) Sentence 1 RefE-ArbZG, the employer is obliged to record the beginning, end and duration of the employees' daily working time. The working time must be recorded electronically on the day the work is performed. It should be possible for it to be recorded by the employee or a third party (e.g., in the case of use of external deployments, for example, in the context of temporary employment) (Section 16 (3) RefE-ArbZG). However, the possibility to delegate the task does not change the employer's responsibility for time recording.

b) Trust-based working time

Trust-based working time is in fact regulated in two provisions: Pursuant to Section 16 (4) RefE-ArbZG, the employer may waive the right to check the working time recorded by the employee. However, the employer must still ensure that it is informed of violations of the statutory provisions on the duration and location of working and rest times - which means that the employer may not completely waive the checking process. Those involved in drafting the bill envisage that it will be easy to programme such a warning message as part of the electronic time recording system. Software manufacturers will be able to help. The cost and effort involved are open issues.

Some employers will no longer consider such a system as trust-based working time. However, one has to concede in favour of the draft bill that neither the RefE-ArbZG nor the Federal Labour Court had previously permitted a waiver of the recording of working time (previously: exceeding eight hours per day). In a second step, however, genuine trust-based working time is still possible for some employees: by making use of a collective agreement opening clause.

c) Employee's right to information and employer's obligation to retain records

At the employee's request, the employer must provide information on the working time recorded pursuant to Section 16 (5) RefE-ArbZG. The employer must provide a copy of the records to the employee upon request. This is nothing new in the light of Article 15 EU-GDPR and its interpretation by the CJEU. Each employer shall be required to have the records available in German for the duration of the entire work or service performed. The maximum limit for the obligation to retain records shall be two years (Section 16 (6) RefE-ArbZG).

d) Collective agreement opening clause

Section 16 (7) RefE-ArbZG contains an opening clause, under which it may be permitted in a collective bargaining agreement or based on a collective agreement in a company agreement or service agreement that

- the working time is recorded in non-electronic form;
- the working time is recorded on a day other than the day on which the work was performed. However, the working time must be recorded at the latest by the end of the seventh calendar day following the day on which the work is performed.
- the working time of certain employees need not be recorded. This includes those employees for whom the total working time is not measured or predetermined or can be determined by the employees themselves due to the special features of the activity performed. Genuine trust-based working time will therefore remain possible for this group of persons, which is not further specified in the draft bill itself. Among other things, the explanatory memorandum mentions executives. However, the Working Time Act shall still not apply in general to executive employees within the meaning of Section 5 (3) of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG). The collective agreement opening clause may therefore only refer to managers below the senior management level.

e) Transitional provisions

Section 16 (8) RefE-ArbZG contains the transitional provisions. Employers with at least 250 employees are allowed to record working time in non-electronic form for a period of one year after the Act enters into force. Employers with fewer than 250 employees may do so for a period of two years, and employers

with fewer than 50 employees may do so for a period of five years after the Act enters into force. As mentioned above, electronic time recording remains voluntary for employers with up to 10 employees on a permanent basis. It is the size of the company that matters, not the size of the operation. What is counted are the heads. This means that part-time employees are counted as full-time employees.

II. Legal assessment

The RefE-ArbZG correctly regulates the obligation to record working time which the Federal Labour Court derived from Section 3 (2) No. 1 ArbSchG for the Working Time Act. Compared to the previous legal situation following the decision of the Federal Labour Court of 13 September 2022, the RefE-ArbZG contains relevant new provisions only with regard to the form and timing of the recording of working time. In practice, this does not help much. Working life and technology have changed considerably since the first European Directive was drafted 30 years ago, its renewal 20 years ago and the entry into force 29 years ago of the ArbZG, which is based on the European regulations. The brief checking of e-mails in the evening or the increase in homeworking and mobile work, especially since the COVID-19 pandemic, are just a few examples. All this was not possible for technical reasons some 30 years ago. Solutions can be also found for most of these new trends based on Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (Working Time Directive), if only the Federal Ministry of Labour and Social Affairs wanted to. The biggest obstacle under EU law is a minimum uninterrupted daily rest period of 11 hours. However, in case of a regular start of work at 9:00 a.m. it would still be possible for an employee to legally write an e-mail in a few minutes at 9:30 p.m. even after a ten-hour workday. This is only prohibited by the ArbZG.

a) What is working time?

Section 2 (1) ArbZG defines “working time” as the “time from the beginning to the end of work, excluding rest periods”. The EU Working Time Directive defines working time differently. According to the Directive, “working time” means “any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice”. The vague term and also the differences between the German understanding and that of the EU have raised some questions, e.g.:

- How is travelling as part of business trips to be treated? Are there differences between active (e.g., car travel) and passive travel (e.g., train travel). Courts in Germany currently see no difference.
- How is on-call duty to be treated? Against the background of the EU definition, the German position (on-call is not working time if the employee is not called upon) is called into question by decisions of the CJEU.

b) Beginning, end and duration of the daily working time

In future, the employer will have to record the beginning, end and duration of the daily working time. The Act should therefore closely follow a clause developed by the Federal Labour Court. However, the Federal Labour Court is to decide individual cases; its task is not to lay down abstract rules. The Federal Ministry of Labour and Social Affairs has apparently hardly reflected on this. The draft bill is likely to lead to new questions regarding its practical implementation if it becomes law: What is to be documented, for example, if the employee starts work at 8:00 a.m., takes a train trip from 11:00 a.m. to 10:00 p.m., during which he does not work but also sleeps, and from 10:00 p.m. to 11:00 p.m. prepares for his work starting at 8:00 a.m. the next day - which is currently not completely unrealistic even for domestic trips? Under the currently prevailing understanding, this would be legal under working time law. However, a start of the daily work at 8:00 a.m., the end at 11:00 p.m., a working time of four hours and a start at 8:00 a.m. on the following day would possibly have to be recorded. Compliance with the minimum daily rest period of eleven hours would thus not be proven. And what about the quarter-hour email session at 9:00 p.m. if the employee worked from 9:00 a.m. to 6:00 p.m. with a half-hour break? This would also be permissible under working time law. Does the start of work at 9:00 a.m., the end of the daily working time at 9:15 p.m. and daily working time of 8.75 hours have to be recorded? Under the draft bill, an employee who cannot predict his or her e-mail activities at the end of the workday would have to make correcting entries for the end and duration of working hours that same evening. This is probably not technically impossible, but it burdens employers and employees with a lot of additional bureaucracy. Especially in the case of remote access to the electronic time recording system, the recording of the time spent can easily take longer than working on the actual e-mail. Is the recording of time itself then actually also working time?

c) Timing and form of the recording of working time

The new RefE-ArbZG sets significantly stricter standards than before with the requirement of same-day recording - which is also not necessary in the light of EU law. Moreover, requiring daily recording is not necessary either according to the case law of the CJEU or according to that of the Federal Labour Court. However, if the protection of working time is to be implemented in a meticulously precise manner, only the daily recording of working time will generally lead to correct results. The memory will only become vague after a few days.

In addition, the RefE-ArbZG requires electronic recording of working time for all companies with more than ten employees. The draft bill leaves open what requirements are to be placed on electronic recording. Is an electronic notepad therefore sufficient? Is an Excel chart sufficient? It seems possible that only handwritten records are inadmissible as a result of the new regulation. However, the case law of the CJEU would also support stricter interpretations: According to the CJEU, a system that cannot be easily manipulated should be established. This suggests that an (electronic) Excel spreadsheet will not meet the required electronic time recording. Manipulation would be eliminated as far as possible if an event-linked system were to record the start, end, interruptions and duration of working time on a fully automatic basis. However, it is not apparent why, for example, the time spent on a business trip or incorrect time recording may not be corrected, but working times must remain documented in an objectively incorrect manner. It will also be difficult to explain why the parties to the collective bargaining agreement may waive automatic recording and allow manual recording in paper form. There is therefore a very strong argument that a simple electronic time recording system, for example on Excel charts, is also possible if the other requirements - such as warning the employer if working time is exceeded - can be ensured. This is also the view of the Federal Ministry of Labour and Social Affairs according to the explanatory memorandum to the bill.

d) Collective bargaining opening clause

The opening clause under Section 17 (7) RefE-ArbZG is also new compared to the previous legal situation. This does provide some room for negotiation for the parties to the collective bargaining agreement. Experience shows, however, that unions do not create room for manoeuvre for employers at zero cost. Moreover, both the exemption from the record-keeping requirement in electronic form and the waiver of daily record-keeping are not primarily an industry issue, but rather depend on the size of the company. Transferring the exemptions to the parties to the collective bargaining agreement therefore does not appear to be a solution that is necessarily required because of their greater proximity to the matter. As far as trust-based working time is concerned, individual trade unions still have ideological reservations. They fear “self-exploitation”. Giving them a dispensation seems pointless and irresponsible.

However, if the Federal Ministry of Labour and Social Affairs itself does not want to bear the responsibility and regulate the options itself, the opening of collective bargaining falls far short: What about employers who are not bound by collective bargaining agreements, what about employers in whose industry (area) collective bargaining agreements are not or not usually concluded? The previous ArbZG permits deviation from substantive regulations, in particular in Section 7 (3) to (6) and in Section 12, by the parties to the works agreement and, in the absence of a works council, by the parties to the employment contract and through the approval of the supervisory authority in areas that do not have a collective bargaining agreement. There is no apparent reason, other than careless work on the part of the Federal Ministry of Labour and Social Affairs, why exceptions to the legally required form of recording working time should be provided solely to employers bound by collective agreements.

Lastly, the collective agreement opening clause remains vague regarding the exemption of groups of persons from the obligation to keep records: The parties to the collective bargaining agreement may exempt employees from the recording obligation “for whom the total working time is not measured or predetermined or can be determined by the employees themselves due to the special features of the activity performed” (Section 16 (7) No. 3 RefE-ArbZG). What is interesting regarding the first two options: according to the wording, it should not matter that the working time *cannot* be measured, but only that it is not measured. Can the employer therefore obtain a waiver from the obligation to record working time via the parties to the collective bargaining agreement so that the employer can decide at its own discretion not to record the working time of certain groups of persons?

e) What applies to executive employees?

The ArbZG is still not intended to apply to executive employees within the meaning of Section 5 (3) BetrVG. The new recording obligation will therefore also not apply to this group of employees. However, this raises the question of the recording obligation that the Federal Labour Court derived from Section 3 (2) No. 1 ArbSchG.

The draft bill does not make any statement on the relationship between these two provisions. In particular, it refrains from including a positive provision that Section 3 ArbSchG should henceforth no longer apply to working time protection. Consequently, Section 16 of the ArbZG should in future be regarded as the special provision for those employees who fall within the scope of the ArbZG. Section 3 (2) No. 1 ArbSchG, as a more general regulation, should also continue to require the recording of all working time for all employees who are excluded from the scope of Section 18 ArbZG but who fall under the scope of the ArbSchG. This also applies in particular to executive employees. The advantage for employers would at least be that electronic recording would not be mandatory for executive employees and that violations "only" of Section 3 (2) No. 1 ArbSchG would not be subject to fines.

f) No exception for marginal cases

The draft bill does not provide for any exceptions to the record-keeping requirement for marginal cases. Working hours that are spent after work for a quick read of an e-mail, a short phone call or a business chat must therefore also be documented. In this respect, the draft bill does not help in the slightest to facilitate the critical debate over many years as to whether such activities fall under protected working time.

g) On-call time?

The assessment of on-call time in terms of working time has been constantly changing. Under certain conditions, the CJEU even considers on-call time to be working time. The draft bill does not provide any solutions for recording such times. Insofar as on-call times are considered to be less stressful than "normal" work, and since the current ArbZG also provides for exceptions for on-call time, these forms of work cannot be recorded without differentiating it from "normal" work. Otherwise, the verification and checking function of time recording would hardly be worth the cost and effort that the draft bill wants to demand from employers.

h) Payment for the working time recorded?

Hardly anything should change in the short term regarding the payment for working time. Occupational health and safety under working time law and the obligation to remunerate work are still two different things. This also applies to overtime. In terms of occupational health and safety, it will also still depend on how long the employee works. Whether the work performance was ordered or at least tolerated by the employer is likely to remain an issue under the law of obligations.

III. Outlook

So far, only a draft bill submitted by the Federal Ministry of Labour is known. In the legislative process, this is followed by a cabinet draft bill that is coordinated with the Federal Chancellor and the ministries at which point the parliamentary process of the actual legislation can begin. Every legislative process is suspended before the parliamentary summer recess, which starts at the beginning of July and ends at the beginning of September. This means that the Act is unlikely to be passed until the fourth quarter of this year at the earliest. As it stands now, the amendments could take effect as of 1 January or 1 April 2024. However, it seems doubtful that the governing parties will agree on this bill. The coalition agreement contains potential for conflict: the three governing parties have pledged to support the unions and employers, to enable flexible working time models to be implemented and to create "scope for experimentation" for this purpose. The Federal Minister of Labour does not fulfil the coalition agreement with this draft bill.

IV. Need for action for companies

The transitional provisions set out in Section 16 (8) RefE-ArbZG create a short grace period for companies regarding the recording of working time in electronic form. Moreover, it is likely to be weeks or months before the Act enters into force. Nevertheless, it seems foreseeable that the obligation to record working time will come. Employers are therefore well advised to gradually introduce a time recording system in the company that complies with the expected regulations, unless working time is already recorded electronically to a sufficient extent.

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The Whistleblower Protection Act is just around the corner

After a lengthy legislative process, things are now getting serious: the Whistleblower Protection Act will enter into force on 2 July 2023. Contrary to what the name of the Act suggests, it is not only about protecting reporting persons, also referred to as whistleblowers, from reprisals, but also requires the implementation of reporting systems to enable whistleblowing in the first place.

I. Scope and subject matter

In terms of personal scope, the Whistleblower Protection Act (Hinweisgeberschutzgesetz, HinSchG) protects reporting persons who have obtained information about breaches in connection with professional activities or prior to the start of professional activities and report or disclose such information to the designated reporting offices. Persons who are the subject of a report or disclosure and other persons affected by a report or disclosure should also be protected. The obligations are addressed to so-called employing entities that employ at least one person. However, the obligation to set up an internal reporting office only applies to employers with, as a rule, at least 50 employees. In addition, there is a transitional period until 17 December 2023 for private employment givers with 50 to 249 employees with regard to the obligation to set up an internal reporting office, unless they belong to certain categories (e.g., the financial services sector). The HinSchG refers to reports and disclosures of information about breaches as listed in the Act. What is important here, is that information about breaches only fall within the scope of the HinSchG if it relates to the employment giver or any other entity with which the reporting person had professional contact.

II. Establishment of an internal reporting office

Employment givers are required to establish internal reporting offices. These reporting offices operate reporting channels through which, for example, employees and temporary workers assigned to the employment giver can contact the internal reporting offices. The internal reporting office can be set up internally at the employment giver or the employment giver can appoint a third party to carry this out. This enables the use of third parties (such as lawyers as ombudspersons) or, if necessary, the establishment of a central reporting office within the Group. The reporting office must be independent and there must be no conflicts of interest. In this respect, it is still a matter of dispute whether and under what conditions a central internal reporting office can actually be set up within the Group. The employment giver remains responsible for remedying the breach in any case, even if a third party is used.

III. Internal reporting procedure

It must be possible to submit reports either orally or in text form. In addition, the Act provides for a personal meeting with the competent person at the internal reporting office at the request of the reporting person. Initially, the draft bill provided for an obligation to process anonymous reports, but this obligation was removed following the compromise reached by the Mediation Committee. The new draft bill states that the internal reporting office "should" also process anonymous reports it receives. However, there is no obligation to structure the reporting channels in such a way that they allow anonymous reporting. The HinSchG also contains a clear procedure on how to deal with incoming reports. The internal reporting office:

- confirms receipt of a report to the reporting person at the latest within seven days of receipt;
- checks whether the reported breach falls within the material scope of the HinSchG;
- stays in touch with the reporting person;
- checks the validity of the report received;
- requests further information from the reporting person, if necessary; and
- takes appropriate follow-up action.

In addition, the internal reporting office is required to provide feedback on the report or any follow-up measures to the reporting persons, unless there are reasons (e.g., endangering further investigations) for not doing so. The HinSchG only provides examples of follow-up measures; possible measures include an internal investigation or the conclusion of the proceedings.

IV. External reporting offices

Furthermore, the Act provides for the Federal Government to establish an office for external reports at the Federal Office of Justice in addition to reporting offices in special areas such as the German competition authority, the *Bundeskartellamt*. As in the case of the internal reporting office, the Act contains, for example, procedural requirements and regulations on follow-up measures. What is important for employment givers is that there is no statutory precedence that would require employees to first report breaches to the internal reporting office. The Act leaves it up to employment givers to increase the attractiveness of an internal report.

V. Protection of reporting persons

In keeping with its name, the HinSchG contains provisions that serve to protect reporting persons, i.e., whistleblowers, who have reported or disclosed a breach internally or externally and who had reasonable grounds to believe at the time that the information they reported or disclosed was true. It is further presumed that the information relates to breaches that fall within the scope of the HinSchG, or that the reporting person had reasonable grounds to believe that this was the case at the time of the report or disclosure. It is therefore not required that the reported facts or conclusions drawn be accurate. It is sufficient that, from an objective ex ante perspective, there were actual indications of a breach. Strict requirements shall also not apply for the assumption of a breach within the meaning of the HinSchG. In any case, the understanding of a person without any specific legal knowledge is sufficient. If a reporting person suffers a disadvantage, such as dismissal or a warning, and claims to have suffered such disadvantage as a result of a report or disclosure under this Act, such disadvantage shall be presumed to be a reprisal for such report or disclosure. The employment giver must then demonstrate that the measure was not taken because of the report or disclosure. In assessing the evidence, the court may, for example, take into account the chronological relationship between the report and the alleged sanction.

VI. Damages and fines

Violations of the HinSchG may result in claims for damages as well as fines. While the draft bill still provided for compensation for immaterial damages, this was deleted following the

compromise reached by the Mediation Committee. In particular, the HinSchG contains provisions on fines. While knowingly disclosing inaccurate information is an administrative offence, obstructing reports or failing to establish an internal reporting office are also subject to administrative fines. Fines can be up to EUR 50,000 for a single violation. However, a grace period of six months applies to the fine for not operating or not setting up an internal reporting office.

VII. Co-determination rights

Co-determination rights in connection with the implementation of the HinSchG may arise from Section 87 (1) No. 1 of the German Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG) (matters relating to the rules of operation of the establishment and the conduct of employees in the establishment) and Section 87 (1) No. 6 BetrVG (the introduction and use of technical devices designed to monitor the behaviour or performance of the employees). If certain requirements regarding the reporting procedure are established, this is not merely a matter of work conduct that is not subject to co-determination, but rather these requirements control the conduct of the employees in the company. When operating technical reporting channels, e.g., via e-portals, this is a technical device intended to monitor the performance and conduct of employees; according to the case law of the Federal Labour Court, it is sufficient that a device is *suitable* for monitoring. Before implementing the reporting channel, an appropriate agreement must be reached with the works council (or, if applicable, the central works council or even the group works council). The location and personnel composition of the internal reporting office, on the other hand, are not subject to co-determination. However, the works council's participation rights may be affected when employees are transferred to or hired as staff of such an internal reporting office.

VIII. Challenges under data protection law

The reporting of irregularities always requires that the reporting person gives the name (and other details) of the possible offender and that his or her data be recorded. The protection of the data of all persons affected by a report is first ensured by maintaining confidentiality. The internal reporting office or the persons working there are required to maintain confidentiality about the identity of the reporting person, the persons affected by the report as well as other persons named. Exceptions apply only if the respective data subject has consented to the disclosure of his or her data or if certain conditions are met (e.g., if the disclosure is necessary for prosecution or for taking follow-up measures). Apart from that, the HinSchG only provides that the reporting office may process data internally.

In addition, the EU General Data Protection Regulation (EU-GDPR) applies. Employment givers must therefore comply with the data protection principles set forth in Article 5 EU-GDPR. They must ensure that the processing of data (including the transfer of data) is carried out lawfully, that the necessary authorisation and erasure concepts are implemented, that the transparency obligations of the EU-GDPR and, last but not least, the comprehensive rights of the data subjects to information, erasure, etc. pursuant to Article. 12 et seqq. EU-GDPR are implemented. This may lead to conflicts of interest. In addition to the basic data protection information set out in Article 13 EU-GDPR, which must be provided to every employee and also to other data subjects when data is collected, a check must be performed to determine when and how, for example, the person accused is informed about the origin of the data and therefore also about the reporting person. In principle, the EU-GDPR provides for an obligation to provide information within one month of receipt of the request from the data subject; information need not be provided only under certain circumstances. Internal processes must be established to regulate the handling of these challenges.

The handling of requests pursuant to Article 15 EU-GDPR is also critical. While German case law affirms the comprehensive right to information of the person affected by the report, it is possible under certain circumstances to refrain from providing information with reference to Sections 29 and 33 of the Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) or the confidentiality requirement set out in the HinSchG if the employer comes to the conclusion in the course of weighing the interests of the parties involved that the information can be refused in the individual case. Aspects such as open or anonymous reporting, scope of the information provided, accuracy of the information, etc. must also be included here. The problem is that when weighing the different interests, this is always done on a case-by-case basis. The result is always subjective, and it can never be ruled out that case law or an authority may take a view that differs from that of the employment giver. It is therefore recommended that the weighing process be comprehensively documented. This applies accordingly to the erasure of data. Erasure concepts must be implemented not only regarding the documenting of the reporting procedure, but also for dealing with incorrect reports. While the data protection supervisory authorities

have in the past assumed a storage period of two months after receipt of the (incorrect) report, this will no longer be justifiable due to the requirements of the HinSchG. The Act stipulates that documentation on the internal reporting procedure must be kept for three years after the procedure has been completed, and that the storage period can even be extended, if necessary. Whether this is compatible with the principle of data minimisation and storage limitation of the EU-GDPR is at least questionable.

IX. Conclusion

The processes associated with the HinSchG are complex, and it is not enough to simply publish contact details for the new internal reporting office on one's own website - rather, the office must also be able to fulfil its tasks in accordance with the applicable regulations. Companies must document, implement and transparently communicate the processes. In addition to coordination with any existing works council and the conclusion of necessary company agreements, a guideline should also be implemented in any case, which implements the instructions in dealing with reports or the requirements of the HinSchG and provides information about the rights, obligations, and risks that may arise for the individual parties involved. In addition, topics such as the correct implementation of confidentiality requirements, documentation, access rights, the protection of systems or data by means of appropriate technical and organisational measures, the handling of consent to the disclosure of information, the provision of information to data subjects, the handling of requests for information, data protection impact assessments and the implementation of erasure concepts must be regulated. If a third party is appointed to operate the internal reporting office or a global hotline is set up, suitable arrangements must be made here as well that implement the legal requirements.

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Appropriateness of executive compensation

The appropriateness of the compensation of board members, managing directors and other exposed authorised representatives of companies has increasingly become the focus of public attention in recent years. The issue does not only affect large public corporations or DAX-listed companies; smaller public limited companies and, above all, non-profit corporations must also comply with certain requirements when determining the compensation of their management personnel. In particular, mistakes can be made in structuring the pension commitments, which can lead to serious consequences for the company and the decision-makers involved.

I. Background

Statutory regulations on the appropriateness of the remuneration of decision-makers can be found, for example, in the German Stock Corporation Act (Aktiengesetz, AktG) or the German Fiscal Code (*Abgabenordnung*, AO). Section 87 (1) 1 AktG, for example, stipulates that it must be ensured that the total remuneration of members of the management board is "appropriate in relation to the tasks and performance of the member of the management board and to the economic situation of the company and that, unless particular reasons so require, the customary remuneration is not exceeded." The same applies to the remuneration of the members of the supervisory board pursuant to Section 113 (1) 3 AktG. Section 55 (1) No. 3 AO applies to non-profit corporations: According to this, a non-profit corporation "may not provide a benefit for any person by means of expenditure unrelated to the purpose of the corporation or disproportionately high remuneration". The Act does not address the question of when remuneration is appropriate or disproportionate. It must be firstly pointed out that there are no fixed rules regarding the appropriateness of the remuneration of managing directors. The upper limit for the appropriateness of the remuneration is to be determined by estimation in each individual case, whereby both internal and external circumstances can be taken into account. It should be noted that there is a certain range of appropriateness and only remuneration that clearly exceeds this range can be regarded as inappropriate (cf. Federal Fiscal Court, judgment of 24 August 2011 - I R 5/10; judgment of 15 December 2004 - I R 79/04).

II. Appropriateness test

In March 2020, the Federal Fiscal Court commented on the question of how the disproportionate nature of the remuneration of a managing director of a non-profit limited liability company within the meaning of Section 55 (1) No. 3 AO must be determined (Federal Fiscal Court, judgment of 12 March 2020 - V R 5/17). Conclusions that can be generally applied can be drawn from the decision of the Court regarding how an appropriateness test should be carried out. The Federal Fiscal Court assumes that the undefined legal term "disproportionate" has the same meaning in non-profit law as the term used by case law in the assessment of a hidden distribution of profits within the meaning of Section 8 (3) Sentence 2 of the German Corporation Tax Act (*Körperschaftssteuergesetz*, KStG). The principles developed concerning the hidden distribution of profits can therefore be used to determine the appropriateness of remuneration. The relevant reference value for the determination of appropriateness is the total remuneration, i.e., all benefits that the managing director receives from the company or from third parties for his or her activities. In addition to salaries, Christmas bonuses and vacation allowances, this also includes insurance premiums paid by the employer as well as the private use of company cars and promised company pension benefits, in particular pension commitments (Federal Fiscal Court, judgment of 12 March 2020 - V R 5/17).

Pension commitments, however, are not to be included in the total remuneration at the provision amount recognised on the face of the balance sheet; instead, a notional net annual premium for a corresponding insurance policy shall be applied. The net annual premium corresponds to the annual premium of a hypothetical insurance policy until the contractually envisaged occurrence of the insured event, without taking into account surcharges for acquisition and administrative costs and taking into account the calculation principles set out in Section 6a of the German Income Tax Act (*Einkommensteuergesetz*, EStG), in particular the interest rate of 6% laid down therein (Federal Fiscal Court, judgment of 12 March 2020 - V R 5/17). It is precisely at this point that mistakes are often made, because often neither the calculation method nor the specific amount of the notional insurance premium is known. This regularly leads to the financial extent of the obligation not being recognised or not being recognised on a timely basis. In order to determine the appropriateness of the total remuneration of a managing director, a comparison can be made either with the remuneration received by managing directors or employees of the company in question (so-called internal arm's length comparison) or with the remuneration paid under the same conditions to managing directors of other companies (so-called external arm's length comparison). According to case law, the reference values required for the (external) comparison can be determined based on remuneration studies (see also Federal Fiscal Court in its judgment of 10 July 2002 - I R 37/01; decision of 14 July 1999 - I B 91/98).

III. Consequences of inappropriate remuneration

If the remuneration proves to be unreasonably high in accordance with the above principles, the question arises as to the consequences and any possible remedies. In this respect, the following areas of law are of particular interest:

1. Non-profit status

An inappropriately high remuneration regularly constitutes a violation of the prohibition of a benefit for a third party under Section 55 (1) No. 3 AO. In the case of particularly serious violations, there is a threat of retroactive revocation of the non-profit status. In practice, this can regularly lead to a retroactive tax assessment due to the retroactive revocation of the corporate income tax and trade tax exemption, which, depending on the type and scope of the economic activity of the organisation concerned, can threaten its existence. In addition - besides reputational damage - this often leads to the loss of income from donations or subsidies.

2. Claims for damages and rescission

As a rule, the organisation concerned suffers financial loss as a result of the excessive remuneration. This often is attributable to breaches of the due diligence process by the individuals or bodies involved in the remuneration decision. This applies in particular if, despite a lack of in-house expertise, external advice was not sought. A liability for damages on the part of the individuals involved can then arise in particular from the respective employment contract in conjunction with Section 280 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). If the decision on remuneration is in fact based on collusion between the grantor and the beneficiary, i.e., deliberate damage to the company concerned, claims are also conceivable against the beneficiary itself, for example under the aspect of intentional damage inflicted in a manner offending common decency (Section 826 BGB). In these cases, the invalidity of the underlying agreements (employment contract, pension commitment) in accordance with Section 134 and Section 138 BGB is also not excluded. Then

there is a risk that a claim will be made for the reimbursement of some or all of the payments made.

3. Consequences under criminal law

If the criminal liability threshold is exceeded in an individual case by granting inappropriately high remuneration, claims against the persons involved may also be considered under Section 823 (2) BGB in conjunction with the relevant criminal offence. If the remuneration agreed is obviously too high, this often represents a violation of the grantor's duty to safeguard the pecuniary interests of others (which the grantor usually has). This may result in the offence of embezzlement (Section 266 of the German Criminal Code (*Strafgesetzbuch*, StGB)). If the beneficiary's participation in an individual case goes beyond (generally permissible) negotiation on his or her own behalf or the beneficiary merely "allows" it to happen, he or she may also be considered to have participated in or to have committed a criminal offence. In addition to a criminal conviction, there is also the risk in these cases of confiscation of the assets acquired as a result of the erroneous granting of remuneration.

4. Indemnification by insurance companies

Affected companies often take out insurance policies under which any loss suffered is at least partially covered in individual cases. In addition to a D&O insurance policy taken out for the benefit of the decision-makers, financial loss liability insurance or fidelity liability insurance may also cover some of the loss. If the dispute about the remuneration results in legal proceedings, there may also be claims under a legal expenses insurance policy. Grounds for exclusion ("intentional breach of duty") often apply where there are serious violations and the threat of criminal action. Irrespective of this, it is advisable that the insurer of any insured events be notified as early as possible. This applies in particular if a settlement agreement with the parties concerned is being considered, as this may curtail the insurer's right of recourse and therefore release it from its indemnification obligation.

IV. How can Luther support you?

In our view, it is advisable to seek independent advice in advance of any intended remuneration decision. This is because, on the one hand, costly and - specifically in the area of pensions - protracted consequences can be avoided, and on the other hand, it also reduces the personal liability risk of the decision-makers involved. As a rule, this does not require a comprehensive assessment as a first step. Problematic structures can often be reliably identified and eliminated during a "quick check". In addition, we will, of course, also assess the remuneration already being paid and support you in solving or at least limiting any subsequent problems that may arise. In order to improve the data basis required for assessing appropriateness, particularly in the area of non-profit organisations, we are also currently preparing a broad-based remuneration study to be launched in the third quarter of 2023. If you are interested in participating in this study and for further details, please contact the author of this article.

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Event information

Note: Luther lawyer and tax advisor, Dr Annekatrin Veit, will speak on the topic of "Appropriateness of pension benefits as a limit on the freedom to structure pensions" at the annual conference on company pensions hosted by the specialist journal DER BETRIEB in Dusseldorf on 14 September 2023. Luther clients receive a 15% discount on the normal conference price. If you are interested, please contact janna.altheim@luther-lawfirm.com and we will be happy to send you the discount code required for your participation. You can download the conference flyer here: https://events.fachmedien.de/event/bav-tagung/ (*in German language*)

■ COMMENTS ON CURRENT COURT DECISIONS

Bonus entitlement in the event of early termination of the employment relationship

If the requirements for a bonus entitlement are not (yet) met and the employer nevertheless unconditionally grants benefits to a group of employees in accordance with a rule based on objective criteria, a claim may arise on the basis of the principle of equal treatment under labour law for employees in a comparable position who are denied the benefit if there is no objective reason for the different treatment.

Federal Labour Court, judgment of 25 January 2023 – 10 AZR 29/22

The case

Since 2012, the employment relationship of the claimant employee has been governed by a group works agreement on the annual granting of bonuses; whether funds are available for such bonuses was finally decided for the past fiscal year in February of the following year. On 30 June 2020, the employment relationship was ended by a termination agreement, which provided for a severance payment based on a framework redundancy programme. This contained a provision under which employees would receive a pro rata bonus in their year of departure in accordance with the bonus regulations in force at the time. In addition - depending on the time of leaving - a factor as well as further conditions for the bonus calculation were defined. At the beginning of June 2020, the Group's Chairman announced that bonuses for the current year were very unlikely. As a result, the claimant did not receive a bonus for 2020, but six other employees whose employment contracts ended on 31 May 2020, did receive a bonus immediately thereafter. The claimant then demanded a (pro rata) bonus for 2020, which the defendant rejected. The subsequent action was upheld by the labour court, whereas the Higher Labour Court dismissed it on appeal by the defendant.

The decision

The 10th Senate of the Federal Labour Court ruled in favour of the claimant. The Court held that the bonus claim for the year 2020 does not result from the framework redundancy programme, as this merely modifies the prerequisites of a claim which may exist under a relevant bonus regulation - in this case in accordance with the group works agreement - but from the principle of equal treatment under labour law. This

requires the employer to treat employees in comparable situations equally when applying a self-imposed rule. As a result, a bonus claim (if applicable, pro rata in accordance with the framework redundancy programme) would also arise for those employees who left their employment after 31 May 2020 as part of a measure taken subject to the framework redundancy programme, as six employees who left before this date were granted a pro rata bonus for 2020. The defendant had thus provided a service in accordance with a rule based on objective criteria; there was no apparent objective reason especially not because of an allegedly worse economic situation - for a different treatment of such employees who subsequently left their employment during the year. At the time of the announcement at the beginning of June 2020, it was not clear that a bonus would not be paid for 2020, whereas pro rata bonuses had been paid shortly before that without being aware of the economic developments.

Our comment

Against the background of this individual case, the decision of the Federal Labour Court is comprehensible from a legal perspective. The different treatment of employees, who left the company after 31 May 2020 due to a measure taken subject to the framework redundancy programme on the one hand, and those, whose employment relationship was terminated by this date due to such a measure on the other hand, was properly assessed as not objectively justified in this case. If an employer grants a bonus in advance or afterwards based on the established rules, all employees who meet the requirements are entitled to receive the bonus This does not apply if the special criteria of the redundancy programme or the basic bonus conditions are not met (please refer to Hamm Higher Labour Court, judgment of 13 September 2022 - 14 Sa 277/22 with appeal on points of law to the Federal Labour Court, case ref. 10 AZR 337/22 for a very illustrative example). In this case, however, the claimant has met the basic criteria of the framework redundancy programme - not least due to the express reference in the termination agreement.

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Dismissal for operational reasons in the event of a transfer of job functions in a matrix organisation

The need for employment also ceases to exist if the employer transfers job functions to another company belonging to the group as part of an entrepreneurial decision.

Federal Labour Court, judgment of 28 February 2023 – 2 AZR 227/22

The case

The claimant employee was employed by the defendant employer as a sales manager for Germany. The defendant is the German subsidiary of a U.S. group of companies active in the field of AI, which is organised in a matrix structure. In addition to the claimant, the defendant employed five other "sales directors." In May 2020, it terminated the employment relationship for operational reasons, as it transferred the claimant's duties to the sales manager for Austria in the group subsidiary located there and the remaining sales directors were to report directly to the sales manager at group level in the future. The claimant then filed an action for unfair dismissal, which was dismissed by the lower courts.

The decision

The Federal Labour Court also reached the same decision. The dismissal was effective because it was due to urgent operational requirements and was therefore socially justified. The defendant's decision to eliminate the claimant's duties removed the need for the claimant to be employed. Urgent operational requirements within the meaning of Section 1 (2) of the German Protection against Dismissal Act (*Kündigungsschutzgesetz*, KSchG) would exist if the implementation of a corporate organisational decision leads to an anticipated permanent elimination of the need for employment. It does not matter whether the entrepreneurial decision was "urgent" for economic reasons, for example, or whether the existence of the company would not have been endangered even without it. In this context, the defendant's decision to transfer the claimant's duties to an affiliated third-party company was not manifestly improper, unreasonable or arbitrary. The constitutionally protected entrepreneurial freedom also includes the right to determine whether certain work is to continue to be carried out within the company or whether it is to be outsourced. Since Section 1 (2) KSchG refers to the possibility of continued employment in a permanent establishment or in the company, but not in the group, it is not significant if the loss of employment is based on the fact that certain tasks will be performed in another group company in the future.

Our comment

The allocation of tasks within a mostly international matrix structure is common in practice. As part of a very fundamental rights-oriented balancing of the rights of entrepreneurs under Article 14 of the German Basic Law (*Grundgesetz*, GG) and the rights of employees under Article 12 GG the Federal Labour Court emphasises that its task is not to ensure a "better or more correct" corporate organisation. The entrepreneur is certainly free to implement decisions that are not directly advantageous to the company. The discontinuation of the possibility of continued employment is to be accepted as long as it is not justified solely by the fact that the conditions of employment are to be eliminated. The Federal Labour Court's reasoning also applies to any purely national organisational decision that leads to the elimination of an employment need, even if it is not economically compelling. The employee carrying the burden of proof will seldom be able to object on the grounds of arbitrariness.

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Impossibility of continued employment due to the discontinuation of employment opportunities - compulsory enforcement

The continued employment of an employee does not become impossible merely because the employer has taken the entrepreneurial decision to transfer the tasks of the dismissed person to other employees; the claim for continued employment is enforced by means of a coercive penalty payment and coercive punitive detention pursuant to Section 888 of the German Code of Civil Procedure.

Federal Labour Court, decision of 28 February 2023 – 8 AZR 17/22

The case

The creditor (= employee) had been employed by the debtor (= employer) since mid-2013. The latter terminated the employment relationship without notice on 14 October 2021, with effect from 28 October 2021, or alternatively with effect from 31 January 2022 by way of an ordinary termination. The labour court upheld the action for protection against unfair dismissal brought against this in its judgment of 12 April 2022 and also ordered the employer to continue to employ the employee until the proceedings are legally concluded. The employer was served with an enforceable copy of the judgment; an application for termination was in the meantime rejected. The employer then appealed and submitted a further application for termination pursuant to Section 9 KSchG. It based this application on the fact that the employee was in effect scheming against the employer. It further requested that compulsory enforcement of the judgment of the labour court be suspended. The higher labour court subsequently dismissed the application for the suspension of the compulsory enforcement pursuant to Section 719 and Section 707 of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO) in conjunction with Section 62 (1) Sentence 2 and Sentence 3 of the German Labour Court Act (*Arbeitsgerichtsgesetz*, ArbGG) as the employer had not sufficiently demonstrated that enforcement would cause it a disadvantage which it could

not be compensated for. In order to enforce his titled claim for continued employment, the employee subsequently applied for the imposition of a coercive penalty payment or, alternatively, for coercive punitive detention pursuant to Section 888 ZPO. The employer now replied that it was impossible for it to continue employing the employee because the employee's job had been eliminated in the meantime as a result of a business decision to that effect. The labour court granted the application, the Higher Labour Court confirmed this.

The decision

The Federal Labour Court reached the same decision. According to Section 888 ZPO, a petition for continued employment in ongoing unfair dismissal proceedings is to be determined by levying a coercive penalty payment and coercive punitive detention. The objection of subjective or objective impossibility could be considered in such proceedings, but only if the impossibility - i.e., the elimination of the employment opportunity - is undisputed or obvious. In this case, an employment opportunity had not already ceased to exist because the employer had made the entrepreneurial decision to eliminate a certain position and to reallocate the tasks accordingly. Something else could apply at most if the elimination had been ordered within the group and the employer had had no influence on this.

Our comment

By its very nature, the petition for continued employment is part of the action for protection against unfair dismissal: after winning the case in the first instance, the employee can enforce the continued employment - and thus in general also the settlement and payment of the remuneration - by coercive means under enforcement law. Since an employer has no interest in the possibly only temporary employment of a dismissed person, the employer therefore typically looks for ways to prevent this. In addition to asserting the impossibility in the proceedings under Section 888 ZPO, the employer may request that the compulsory enforcement be stayed under Section 719 and Section 707 ZPO in conjunction with Section 62 (1) Sentence 2, Sentence 3 ArbGG. For this purpose, however, the employer must show to the satisfaction of the court that enforcement will result in a disadvantage that cannot be compensated for. If an appeal is not filed, the employer may also submit an action raising an objection to the claim being enforced pursuant to Sections 767, 769 ZPO (e.g. on account of a submitted application for termination). However, according to the present decision, an interim corporate decision as a result of which the job of the dismissed employee is subsequently eliminated is not suitable for preventing compulsory enforcement.

In practice, a new notice of termination (this time on operational grounds) should be issued as a precautionary measure in such a case. This has several advantages: On the one hand, there is another fact of termination which then precludes enforcement, and on the other hand, the case law described above, under which the impossibility of continued employment depends on whether the employer has brought it about itself, is not relevant. Lastly, such an approach is also favourable from a tactical point of view, as it increases the pressure on the employee to look for another job if necessary. The employee will be interested in looking for a new job under these circumstances, since otherwise wages for default of acceptance will be reduced at a later date due to the malicious failure to acquire amounts from other use of his or her labour under Section 615 Sentence 2 BGB.

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Cancellation of a transfer - outsourcing of the target operations to another company

The effect of a transfer to another job ends when the target operations are outsourced to another company, which is why a request by the works council to cancel the transfer becomes unjustified at this point in time.

Federal Labour Court, decision of 15 November 2022 – 1 ABR 15/21

The case

As part of a company reorganisation, the employer assigned a newly formed field of work to the employee without obtaining the prior consent of the works council. The employer subsequently outsourced the work to another company. In the works council's opinion, the assignment constituted a transfer, which is why it demanded its cancellation; the outsourcing that had taken place did not preclude this because the employee had not been effectively assigned to the outsourced part of the company's operations due to the transfer in violation of co-determination. In addition to the cancellation of the measure, the works council requested that the employer be ordered, under threat of an administrative fine, not to deploy the employee in the outsourced part of the company's operations. The labour court granted the motions, the Higher Labour Court dismissed them following the employer's complaint.

The decision

The Federal Labour Court dismissed the appeal of the works council on points of law. The proceedings to rescind the measure pursuant to Section 101 of the German Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG) are concerned with the question of whether a measure in violation of co-determination is currently or in the future permissible; in this context, it is not relevant whether the measure was permissible under works constitution law when it was implemented. If the measure ends before the conclusion of the legal proceedings, the cancellation application becomes unfounded. In this case, the transfer ended with the outsourcing. Furthermore, the Senate took the application that contained the threat of an administrative fine literally and understood it as an application pursuant to Section 23 (3) Sentence 1 BetrVG. The understanding of this application as

a petition to order a coercive penalty payment, which deviated from the wording, led to the Higher Labour Court deciding on a different subject matter of the proceedings than the one applied for. However, the application for an order to cease and desist pursuant to Section 23 BetrVG also only serves to protect the order under works constitution law against gross violations by the employer in the future. Insofar as a renewed violation of the duties constituting the grounds for the action is excluded for legal or factual reasons, such a claim would not exist. Since the employer can no longer transfer employees to the outsourced part of the company's operations, a future infringement of the law is therefore no longer to be feared.

Our comment

The Senate emphasises that both the request to order the employer to cancel the measure pursuant to Section 101 BetrVG and the application for an order to cease and desist have a purely future-related safeguarding function, but have no retrospective punitive nature. The termination of an individual personnel measure - also over the course of time - therefore renders the request to order cancellation futile. A gross violation within the meaning of Section 23 BetrVG, on the other hand, is likely to be a rare exceptional case. The interplay between Sections 99, 100 and 101 BetrVG permits a wide variety of tactics that practically nullify the co-determination rights of a works council in the case of individual measures that are not planned on a permanent basis. Nevertheless, this path cannot be recommended to an employer except in an "emergency", because employer and works council will meet again, and at the latest during the next negotiation of a works agreement, the works council will remember the (from its point of view) foul play.

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Special payments: ineffectiveness of a reservation of their voluntary nature with potential validity for subsequent individual agreements

If employment contract provisions on the voluntary nature of special payments by the employer also include subsequent individual agreements between the parties to the employment contract, such a clause unreasonably disadvantages the employee pursuant to Section 307 (1) Sentence 1 BGB and is therefore invalid.

Federal Labour Court, judgment of 25 January 2023 – 10 AZR 109/22

The case

The employment contract of the claimant employee contains a clause under which the payment of Christmas and/or vacation bonuses is at the discretion of the employer and does not constitute a legal claim for the future, even if the payment is made several times and without an express reservation of its voluntary nature. From 2015 to 2019, the defendant paid a vacation bonus in June and a Christmas bonus in November of each year. In 2020, the defendant ceased making the payments and introduced a new bonus system in the Summer of 2021 to replace the vacation and Christmas bonuses. The claimant then demanded vacation and Christmas bonuses for 2020 in the amount of the last payments made. The subsequent action was dismissed by the labour court, and the Higher Labour Court upheld the action on appeal by the claimant.

The decision

The 10th Senate of the Federal Labour Court reached the same decision and accordingly rejected the defendant's

appeal on points of law. The claimant's entitlement to payment of vacation and Christmas bonuses in an amount to be determined at the employer's equitable discretion pursuant to Section 315 BGB is based on company practice. The required interpretation of the defendant's previous conduct suggests a corresponding intention to commit. The assumption of a company practice and a resulting claim is also not precluded by the reservation of the voluntary nature of the bonuses contained in the employment contract, as this disadvantages the claimant unreasonably pursuant to Section 307 (1) Sentence 1 BGB and is therefore invalid. Under the clause, the claimant initially reserves a unilateral right regarding the decision (for the first time) on the granting of special bonuses, although the reference that such payments are "at the free discretion of the employer" means further that the employer generally reserves the right to grant them and only has to comply with general limits that are always applicable to the exercise of rights, the decision is, however, not to be based on the standard of fairness. In this context, the clause aims to define a later declaration of conduct that is already in the contract by stipulating that the payment of special allowances does not constitute a legal claim for the future even if the payment is made several times and without an express reservation of its voluntary nature. It thus aims at preventing the accrual of any legal right of the employee that is not otherwise stipulated in the employment contract. The provision therefore does not stand up to a review of its content because it does not refer to the reason for the origin of any claims and, in accordance with Section 305c (2) BGB, allows the interpretation that the reservation also covers subsequent individual agreements on special allowances, although individual contractual agreements take precedence over (conflicting) general terms and conditions pursuant to Section 305b BGB, even if they were made subsequently.

Our comment

The decision consistently continues the case law of the Federal Labour Court on standard reservations of voluntariness in employment contracts. Back in 2011, the 10th Senate ruled that a reservation may also constitute an unreasonable disadvantage if it (potentially) covers subsequent individual agreements (Federal Labour Court, judgment of 14 September 2011 - 10 AZR 526/10). A reservation of voluntariness may not be applied as a whole to such claims which are in the synallagma of the employment contract, nor to those which are granted by the associated regulation or potentially in the future, even if certain performance parameters still have to be determined. Precisely because of the constant risk of the ineffectiveness of clauses in employment contracts, separate reservations of voluntariness should be regulated for each individual granting of benefits. A reservation of voluntariness integrated in the employment contract is not sufficient in this case to prevent the emergence of a company practice.

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Unequal treatment of older severely disabled employees due to a cap in the redundancy programme

A maximum compensation limit in a redundancy programme violates the principle of equal treatment under works constitution law if this leads to older severely disabled persons not receiving an additional severance payment that is also provided for in the redundancy programme with regard to their severe disability.

Federal Labour Court, judgment of 11 October 2022 – 1 AZR 129/21

The case

The claimant employee has a degree of disability of 80 and was employed for many years by the defendant employer, which decided in 2019 to close the plant where the claimant worked. The redundancy programme concluded with the works council provided for a basic severance payment and an additional payment of EUR 2,000 for severely disabled employees and those with equal rights with a degree of disability starting from 50; at the same time, the maximum severance payment per employee was limited to EUR 75,000. According to the redundancy programme, the claimant would already have been entitled to a basic severance payment of just under EUR 93,000, but the defendant also did not pay him the additional severance payment for the severely disabled. The claimant then demanded a further 2,000 euros. The Labour Court and Higher Labour Court dismissed the action.

The decision

The Federal Labour Court awarded the claimant the amount. This does not conflict with the maximum amount provision because it is invalid due to a violation of the principle of equal treatment under works constitution law pursuant to Section 75 (1) BetrVG to the extent that it is applied to the additional severance payment amount. Although the parties to the works agreement have scope for assessing and structuring redundancy programmes, they always have to comply with Section 75 (1) BetrVG, which is violated when there is unequal treatment of individuals if a group of norm addressees is treated differently in comparison to other norm addressees, although there are no differences between them that justify this. Such a case existed here due to the maximum severance provision, because the additional amount was to be paid to all severely disabled persons with a degree of disability of 50 or more, but in fact only those severely disabled persons received it whose basic compensation did not exceed EUR 75,000; this resulted in the double unequal treatment of older severely disabled persons. The forming of groups within the severely disabled was also not justified by the purpose of ensuring an equitable distribution, especially since the special severance payment for severely disabled persons was actually intended to take into account the circumstance of compensating for special disadvantages that typically arise for older severely disabled persons in particular when they lose their jobs.

Our comment

The Federal Labour Court has once again confirmed the admissibility of caps as such because redundancy programme funds are limited and are intended to mitigate or compensate for the disadvantages of the employees affected by a change in operations in a manner that distributes the funds fairly. Particularly high severance payments can be capped in order to distribute the resulting “gained” funds to other employees. However, equitable distribution also means that the special difficulties of severely disabled people in the labour market must be taken into account separately. Supplements such as those here must therefore be disregarded in the cap. Violations of the principle of equal treatment may be asserted as a legal error by any - alleged - claimant regardless of whether the works council challenges a redundancy programme measure or not. Once a legal error has been established, the redundancy programme budget is not redistributed, but increased instead - which is why there are potentially significant risks concerning the total amount of a redundancy programme.

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■ CASE LAW IN A NUTSHELL

Fraudulent obtaining of an A1 certificate

CJEU, judgment of 2 March 2023 - Joined Cases C-410/21 and C-661/21 (DRV Intertrans)

An A1 certificate fraudulently obtained in another Member State may be disregarded in criminal proceedings for fraud in the employment Member State under certain circumstances.

The case

The original disputes originated in Belgium in the context of two criminal proceedings for the evasion of social security contributions. The proceedings are each directed against companies for transport services that have a Community license in Belgium and Lithuania and Slovakia, respectively. Despite the exclusive performance of the transport services in Belgium, the registered offices in the other countries were used for the acquisition of an A1 certificate to avoid social security contributions. The Belgian *Hof van Cassatie* (Court of Cassation), which is conducting the proceedings, requests a preliminary ruling concerning the interpretation of the regulations on the coordination of social security systems and the regulation establishing common rules for access to the international freight transport market: May the A1 certificate issued in a Member State be withdrawn provisionally in the employment Member State in the criminal proceedings so that the presumption attached to the AI certificates that the workers concerned are properly affiliated to the social security system of that issuing Member State ceases to apply? If the answer to that question is in the negative, may the authorities of the employment Member State, disregard the AI certificates at issue on the grounds of fraud? Lastly, the referring court seeks to know whether the fact that an undertaking has obtained a licence for road transport in a Member State and which therefore must have an effective and stable establishment in that Member State, necessarily constitutes irrefutable proof that its registered office is established in that Member State, for the purposes of determining the applicable social security system?

The decision

The CJEU rules that an A1 certificate issued by the competent institution of a Member State is binding upon the institutions and courts of the Member State in which the work is carried out. However, in such circumstances, a court of the Member State in which the work is carried out, seized in the context of criminal proceedings brought against persons suspected of having fraudulently obtained or used the same A1 certificate, may find that there has been fraud and consequently disregard that certificate, for the purposes of those criminal proceedings, provided that, first, a reasonable period has elapsed without the issuing institution having reconsidered the grounds for issuing that certificate and having adopted a decision on the specific evidence submitted by the competent institution in the host Member State, which gave rise to the view that that certificate had been obtained or used fraudulently, as the case may be, by cancelling or withdrawing the certificate in question and, second, that the guarantees inherent in the right to a fair trial which must be afforded to those persons have been respected. The fact that a company holds a Community licence for road transport issued by the competent authorities of a Member State does not constitute irrefutable proof that that company's registered office is in that Member State for the purpose of determining, which national legislation on social security is applicable.

Supplement for the short-time working allowance under a collective agreement

Federal Labour Court, judgment of 12 October 2022 – 5 AZR 48/22

The supplement to the short-time working allowance pursuant to Section 3 No. 3 (2) of the Collective Agreement on Short-Time Work shall be paid for each hour of work lost due to short-time work and shall amount to 16% of the average net hourly wage determined from the sum of the net wages of the last three months before the start of the short-time work.

The case

The parties are in dispute about the amount of a collectively agreed allowance for short-time working. The employment relationship of the claimant employee is governed by the "Collective Agreement on Temporary Relief for Short-Time Work" ("TV Kurzarbeit") by virtue of the fact that both parties are bound by the collective agreement. Section 3 No. 3 (2) TV Kurzarbeit contains the following provision: "*For the duration of the short-time work, the employee concerned shall receive an allowance from the employer in addition to the short-time working allowance in the amount of 16% of the average net remuneration of the last 3 calendar months. Total remuneration may not exceed 100% of net pay.*" The defendant employer calculated the claimant's short-time pay for the months of April through June 2020 by totalling the claimant's net pay for

the months of January through March 2020 and then dividing that amount by the hours worked during that period. The employer paid 16% of the average net hourly pay for the last three months calculated in this way for each hour lost due to short-time work as a supplement to the short-time working allowance. The claimant considers this calculation to be contrary to the collective agreement. In the claimant's view, the allowance for short-time work is always 16% of the average net pay of the last three calendar months, irrespective of the amount of short-time work performed by the employees in each case. The corresponding claim for a higher allowance was rejected by the labour court and the Higher Labour Court.

The decision

The Federal Labour Court also ruled in favour of the defendant. The claimant's entitlement to the short-time working allowance had been met in full. The interpretation of the normative part of a collective agreement follows the rules applicable to the interpretation of laws. In case of doubt, preference must be given to the interpretation of the agreement which leads to a reasonable, appropriate, purposeful and practicable regulation. The wording of Section 3 No. 3 (2) TV Kurzarbeit permits both the calculation method of the defendant and that of the claimant; however, the meaning and purpose of the collectively agreed supplement to the short-time working allowance decisively supports the calculation method applied by the defendant. As a result of short-time work and the associated loss of work, the employees affected would suffer a loss of earnings, as the social security benefit for the short-time working allowance does not fully compensate for the reduction in earnings caused by short-time work. These losses are to be mitigated by the collectively agreed supplement for short-time working. Therefore, a calculation method according to which a "uniform allowance" is granted irrespective of how many working hours are actually lost is far-fetched. Moreover, this would otherwise lead to the unintended result that employees affected by short-time work would essentially retain their average net pay for the three months prior to short-time work, regardless of the amount of short-time work actually performed. The final argument in favour of an interpretation of Section 3 No. 3 (2) TV Kurzarbeit which is linked to the loss of working hours, is that this results in a regulation that can be applied in practice because the working hours lost by the employees affected by the short-time work are known and the allowance can be calculated easily and without much effort.

Dismissal of the data protection officer only for good cause

CJEU, judgment of 9 February 2023 - Case C-453/21 (X-FAB Dresden)

National legislation under which a data protection officer (DPO) employed by a controller or a processor may only be dismissed for good cause is also compatible with EU law if the dismissal is not related to the performance of his or her tasks, as long as the national legislation does not compromise the objectives of the EU-GDPR.

The case

The claimant in the original legal dispute performs the duties of chair of the works council and holds the role of vice-chair of the central works council. The employer and other subsidiaries appointed him as DPO in order to achieve a uniform level of data protection throughout the group. At the request of the Thuringian State Officer for Data Protection and Freedom of Information and for operational reasons, he was dismissed from his duties as DPO. The lower courts ruled in favour of the claimant and found that he was still a DPO.

The decision

The CJEU considers the strict provision of Section 6 (4) 1 Federal Data Protection Act (*Bundesdatenschutzgesetz*, BDSG), under which a DPO employed by a controller or processor may only be dismissed for just cause, even if the dismissal is not related to the performance of his tasks, to be compatible with EU law (Article 38 (3) 2 EU-GDPR). However, this should not prevent a DPO from being dismissed due to a conflict of interest within the meaning of Article 38 (4) 2 EU-GDPR. The conditions under which such a conflict of interest could be established would have to be determined by the national court on a case-by-case basis, taking into account all relevant circumstances, including the organisational structure of the controller or processor and all applicable (internal) legislation. In principle, the performance of the DPO's tasks and other tasks at the controller or processor are mutually compatible, so that the DPO can also be entrusted with other tasks and duties. However, the controller or processor must ensure that these other tasks and duties do not lead to a conflict of interest. Such a situation would arise if the performance of other tasks and duties could affect the position of the DPO. The data protection officer should therefore not be assigned tasks that would require him or her to determine

the purposes and means of data processing, since the data protection officer must monitor them independently.

Submission of job application documents to the works council also in digital form

Higher Labour Court of Saxony-Anhalt, decision of 13 October 2022 – 2 TaBV 1/22

The required job application documents within the meaning of Section 99 (1) Sentence 1 BetrVG do not have to be submitted in paper form, but can also be submitted in such a way that the works council members who have company laptops at their disposal are given comprehensive access to a job applicant management tool when informed about an intended recruitment.

The case

The parties are in dispute about, among other things, the replacement of the consent to the hiring of an employee refused by the works council. In response to a job advertisement, the employer decided to hire an applicant and applied to the works council for its consent to the hiring pursuant to Section 99 BetrVG. During this process, the employer allowed the works council to access all application documents of all applicants. In this regard, the employer maintains a software program for mapping job postings and application procedures. Applications received in paper form are fully digitised and uploaded into the program. The modalities for handling this tool were laid down in a company agreement. The works council, however, refused to approve the hiring. The works council is of the opinion that the approval procedure was not properly initiated because the employer did not submit the application documents to the works council in paper form. The labour court replaced the consent of the works council.

The decision

The Saxony-Anhalt Higher Labour Court reached the same decision and ruled that the works council had received sufficient information. Prior to an intended recruitment, the employer must provide the works council with information on the other applicants and make the application documents available, Section 99 (1) BetrVG. The employer had fulfilled this legal obligation by granting the works council members comprehensive access to the digitised documents. The availability of laptops meant that each member of the works council was able to inspect the information at any time. In the age of digitalisation, it can no longer make any difference whether the works council is presented or given all documents in paper form or whether the works council members are able to obtain the relevant knowledge by “presenting it” with laptops. There was no comprehensible reason why the employer is still required without exception to print out job application documents and submit them to the works council in paper form. The only decisive factor is the possibility that the necessary information is available at any time. An appeal on points of law has been lodged against the decision (case no. with the Federal Labour Court: 1 ABR 28/22).

■ INTERNATIONAL NEWSFLASH FROM UNYER

Austria: Dismissal justified due to long periods of sick leave

In practice, employers are often faced with the question of whether and under what conditions dismissal due to sick leave is permissible. The Austrian Supreme Court recently ruled in two decisions that dismissal due to sick leave may be justified and that longer and/or more frequent sick leaves may constitute grounds for dismissal based on personal reasons. One of these two decisions is presented below.

Austrian Supreme Court - judgment of 27 April 2022, 9 ObA 26/22x

The case

The claimant was employed in the assembly unit and took very lengthy periods of sick leave, which led to a situation where shifts could not be reliably planned and to resentment among her co-workers when the claimant was transferred to a “soft job”. Continued employment at her previous job was deemed too great a health risk by the company physician. This assessment was based on a general practitioner’s certificate which the employee herself had submitted to the company doctor and from which it emerged that, from a medical point of view, employment in the assembly unit was no longer an option. The employer’s decision that it would no longer employ the employee in her original job was therefore based on a medical assessment. Subsequently, the employee was nevertheless dismissed.

The decision

The Supreme Court considered the dismissal to be justified, essentially stating that the dismissal was based on person-related grounds for dismissal. Based on the information provided by the employee, the employer could justifiably assume in an objective assessment that the employee could no longer be deployed at her workplace in the assembly unit. The dismissal was therefore to be regarded as effective and not as unacceptable on social grounds.

Our comment

Despite the recent decision(s) of the Supreme Court on this exciting topic, the assessment of whether a dismissal due to sick leave is legally permissible is still a decision that always has to be made on a case-by-case basis. Questions about the number and frequency of sick days taken, a future prognosis, possibly special regulations of the Disabled Persons Employment Act, the right to the continued payment of remuneration and the general principles of the employer’s duty of care/the employee’s duty of loyalty among other things play a role in the assessment.

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France: The 4-day week – an experiment

At a time when France is going through a post-Covid crisis about the meaning of and relationship to work, could the 4-day workweek be the solution? After a brief overview of the experiments underway around the world, we will look at the 4-day week in France to highlight some of its benefits and risks.

In many countries, the 4-day week is spreading significantly. Tested on a large scale in the United Kingdom in 2022, it will be continued by 92% of the test companies and has led to a 71% reduction in burn-out factors. In Japan, Microsoft reported a 40% increase in productivity when it tested this formula in August 2019. In Spain, 200 volunteer companies are testing the idea of reducing their workweek to 32 hours over 4 days until 2025, with no reduction in pay and with government support. In Belgium, a “Deal for Employment” plan allows employees to choose, subject to their employer’s agreement, to work 4 days at a rate of 10 hours per day. In Iceland, 90% of Icelanders work 36 or even 35 hours over 4 days, with full pay.

In France, 25 years after the Aubry laws and on the 30th anniversary of the 1993 European Working Time Directive, roughly one in three companies would be willing to contemplate a 4-day week (Robert Half survey, October 2022). In practice, the 4-day week can take very different forms: 35 or 32 hours a week over 4 days without loss of pay, or even other formulas. Several objectives can be pursued, such as enhancing the employer’s brand and attractiveness in tight labor markets, with a view to improving the quality of life and working conditions (QLWC), contributing to the ecological transition and bolstering the CSR policy.

While it is certainly possible for employers to introduce a 4-day week unilaterally, in practice collective bargaining is a key factor for success, since it serves to take into account all the constraints of the parties involved.

The 4-day week can potentially apply to all employees, company sizes and sectors. However, its medium- and long-term impact has yet to be measured. Various questions arise, especially what impact it has on the workforce, company performance and the physical and mental health of employees. Similar to work from a Home Office, the four-day week can also bring new risks that need to be taken into account in occupational safety and health risk assessments. Training in management and meeting optimization can be invaluable.

If any changes are made to the employment contract, particularly to compensation, an amendment to the employment contract will need to be signed.

In the end, at the company level, even if the current regulations allow the switch to a 4-day week, in practice a feasibility study is essential in order to adjust the organisation to this new way of working.

On a national level, the *Assises du Travail's* Report entitled "Reconsidering Work," submitted on 24 April 2023 by Sophie Thiéry and Jean-Dominique Sénard to Olivier Dussopt, the French Minister for Labor, Full Employment and Integration, proposes that the Social, Economic and Environmental Committee (CESE) be asked to give an opinion on the ongoing 4-day week experiments. So stay tuned!

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■ GENERAL INFORMATION

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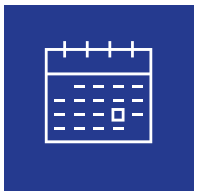
Events, publications and blog



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.

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