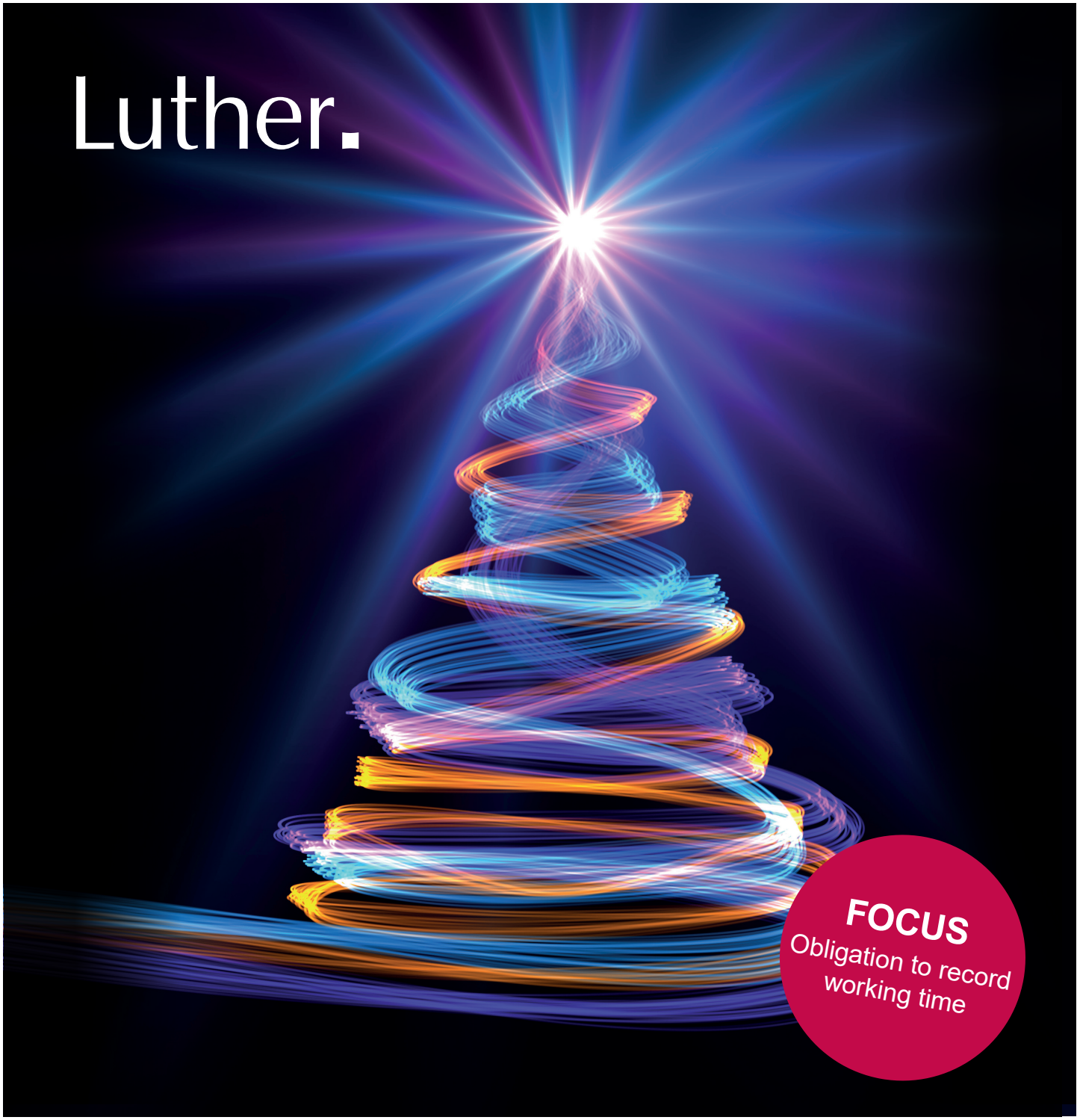

Labour & Employment Law Newsletter

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Dear readers,

there are only a few days left until Christmas. A white winter landscape with the occasional glistening ice can already be seen in many places. We are now looking forward all the more to a merry and contemplative Christmas. Just in time for this, we can put our newsletter under the Christmas tree for you to read.

It's hard to imagine that just a few months ago, we were still experiencing midsummer temperatures and were again able to enjoy our vacation by the sea or in the mountains after the long break caused by the pandemic. Planning for the upcoming summer vacation has already begun for many. What could be more fitting for us employment lawyers than to deal with the topic of "workation", that is, the combination of work and vacation. In his article, Prof. Dr Robert von Steinau-Steinrück looks at the legal framework that employers must observe in this new form of work.

The topic of the recording of working time has been on everyone's lips since the Federal Labour Court's recent decision of 13 September 2022. The reasons underlying the decision are now available and are keeping employment lawyers and human resource managers busy. Many had already predicted the end of trust-based working time. In his article, Paul Schreiner addresses this hot topic and analyses the decision and its consequences for business practice, taking the current legal situation into account.

In this issue, our colleague Xavier Drouin from FIDAL in Strasbourg once again provides insights into French employment law. He explains the legal framework of the "forfait jour," an alternative to the 35-hour week in France.

In addition, we also report again in this issue on current developments in the area of company pension schemes.

In addition to our main topics, this issue also provides you with the usual overview of current decisions of the labour courts, which we consider to be of particular relevance to HR work.

We wish you a contemplative Christmas season, peaceful days between Christmas and New Yer's Eve and a happy, healthy, and successful 2023.

Yours'

Achim Braner

Obligation to record working time – what gifts did the Federal Labour Court bring shortly before Christmas

With its "time clock" judgment, the Court of Justice of the European Union (CJEU) decided in 2019 that EU Member States must oblige employers to record working time. However, this has not yet been transposed into German law – probably one of the reasons why the courts felt once again forced to become creative. In mid-September 2022, the Federal Labour Court decided that such a legal obligation already existed: it is derived directly from the Occupational Safety and Health Act (*Arbeitsschutzgesetz*, ArbSchG). The Federal Labour Court surreptitiously provided the reasoning for this on the first weekend of Advent. Is this a new stroke of genius from Erfurt, an emergency solution with far-reaching consequences or merely another wake-up call to the legislature to finally take action? Let's look at this together.

I. The "cause of all evils"

With a drum-roll, the **CJEU** decided in Spring 2019 that, in order to protect the safety and health of workers, Member States must require employers to set up an **objective, reliable and accessible system enabling the duration of time worked each day to be measured** (judgment of the CJEU of 14 May 2019 - C-55/18 [CCOO]). It remained unclear whether the judgment or the underlying EU law (more precisely Directive 2003/88/EC concerning certain aspects of the organisation of working time and Article 31 (2) of the European Charter of Fundamental Rights) already directly imposes a corresponding obligation on employers or whether this requires codification in national law. The simplest approach would

therefore have been for the German legislature to have taken action – whether required or not – but the relevant draft legislation has not yet been introduced despite repeated announcements. According to current statements made by the German Federal Ministry of Labour and Social Affairs, an adequate, "practicable" draft law can probably be expected by the end of the first quarter of 2023. Whether, when and with which content this will be available remains to be seen. The **status quo** is that German working time law does not recognise any obligation to record working time in full; only the **obligation to record working time** in excess of the working day, i.e., overtime, follows from Section 16 (2) of the Working Time Act (*Arbeitszeitgesetz*, ArbZG).

II. When the legislature sleeps, "Erfurt" acts

In Autumn 2022, the First Senate of the Federal Labour Court based in Erfurt provided clarity to a certain extent in a case that was about something completely different, namely the issue of the works council's enforceable participation rights regarding the electronic recording of working time. After unsuccessful negotiations on the introduction of an electronic time recording system, the works council initiated resolution proceedings to set up a conciliation committee. While the court of first instance (Minden Labour Court) rejected the works council's application, the Higher Labour Court (*Landesarbeitsgericht*, LAG) Hamm upheld its complaint. The employer's appeal on points of law against this decision was in turn successful before the Federal Labour Court.

The Federal Labour Court decided that the works council was not entitled to assert the right of initiative because such a right could only exist where there was not yet a binding legal requirement for the employer to carry out a particular operational measure. If, however, there was already such a legal requirement, there is no longer any room for a corresponding right of initiative. This is the case here, because employers are required by law to introduce a system to record the start and end, and thus the duration, of working time, including overtime. However, the requirement to record working time does not follow – as is sometimes assumed – directly from Article 31 (2) of the Charter of Fundamental Rights, Directive 2003/88/EC or an analogous application or interpretation of Section 16 (2) ArbZG in conformity with EU law; **according to the Federal Labour Court, the obligation to record working time follows from Section 3 (2) no. 1 ArbSchG!**

Under this regulatory framework the employer must ensure that an "appropriate organisation" is in place and provide the "necessary means" for the planning and implementation of occupational health and safety measures, taking into account the nature of the activities and the number of employees, which also includes the requirement to record working time in line with EU law. The fact that the substantive requirements regarding working time are governed in the Working Time Act does not preclude the requirement from being located in the Occupational Safety and Health Act. In transferring the CJEU's standards, the Federal Labour Court also set out in concrete terms that a recording system may not be limited to merely collect the start and end of the daily working time – the resulting **data must** also **be recorded**. Furthermore, this obligation to record data is not limited to making a **system** available to employees; rather, the system must **actually be used**. The time recording requirement covers **at least** all **employees within the meaning of Section 5 (1) of the Works Constitution Act (*Betriebsverfassungsgesetz,* BetrVG)**. Although derogations from this requirement can in principle be governed by Member States under Article 17 (1) of Directive 2003/88/EC, however, the German legislature has not yet made use of this option.

At the same time, the judges in Erfurt decided that the works council (in this case) also had no enforceable right of co-determination regarding the design of the working time recording system. But a word of caution: contrary to what has been assumed in some cases, the Federal Labour Court did not mean to deny works councils any rights of co-determination in connection with the implementation and design of a working time recording system. Rather, the comments clearly show that the rejection of the application is due solely to the limited subject matter of the application. The First Senate of the Federal Labour Court emphasises that the works council (as long as the legislature does not introduce any detailed legal requirements) has a right of initiative for the "how" of the time recording to be used in the company under Section 87 (1) no. 7 BetrVG in conjunction with Section 3 (2) no. 1 ArbSchG. However, this should not be limited to time recording in electronic form. Because Section 3 (2) no. 1 ArbSchG leaves room for manoeuvre with regard to the form of the time recording system, this does not necessarily have to be carried out electronically without exception; nor is it excluded that the recording of time is delegated by the employer to employees.

III. "Risks and side effects" of the decision – instructions for use

The Federal Labour Court emphasises in several places that its analysis is based on the assumption that the legislature has not yet established any specific regulations regarding the

time recording obligation. Even without this, however, conclusions can already be drawn from the decision for dealing with the time recording obligation.

1. Obligation to record time and form

The following is clear from the Federal Labour Court's decision: all employers are – and indeed already are now – obliged in principle to record working time in full. Whether a works council exists, is irrelevant. Neither the Federal Labour Court nor the CJEU nor Section 3 (2) no. 1 ArbSchG prescribes a specific form – the latter merely sets out an occupational health and safety framework that does not contain any decisions regarding time recording or working hours in general. Consequently, there is in particular no unconditional obligation to record time *electronically*; on the contrary, the Federal Labour Court emphasises that time recording does not have to be carried out electronically without exception and on a mandatory basis.

The CJEU's requirements that a system must be objective, reliable and accessible on the one hand and, on the other hand, the clarification from the Federal Labour Court that working time must be recorded, and the employer must actually make use of the system, therefore remain. This means: in order to meet the purpose of time recording under occupational health and safety law, not only the **start and end of working time** must be **documented**, but also **break times**. The **form** is **irrelevant for the time being, as long as the information can be reliably verified**. In fact, working time can theoretically even be recorded using pen and paper. As the First Senate also points out that special features of the specific activity or the employer must be taken into account when implementing a time recording system, it seems conceivable that different forms of time recording are also used in the same business or company.

2. Trust-based working time and delegation

Don't worry, neither the CJEU nor the Federal Labour court are challenging flexible forms of work used in the world of work, for which we are very often envied, especially by people from Austria. Even after their decisions, the use of trust-based working time models continues to be possible within the previous framework, as long as the regulatory requirements (i.e., in particular those relating to working time) are complied with. However, the time recording requirement may lead to a **need for changes in the documenting of** working time. Particularly in the case of trust-based working time, where the employer entrusts the decision as to when the employee works within the working time limits to the employee, the possibility of delegation to the employees, which the Federal Labour Court explicitly classifies as permissible, is likely to become even more relevant than before. Delegation of the recording requirement also makes sense for business trips and on-call times. In addition, the employer must ensure that it can **access the documentation** at short notice. However, do not forget: trust is good, control is better! It must be ensured in any event that the employer can access the records at any time, otherwise there is a lack of access to the system for the employer or the regulatory authority, respectively!

3. Executive employees

Unlike the Working Time Act, **the Occupational Safety and Health Act does not exclude executive employees from its scope**, which is why it must be clarified as to which employees the time recording obligation now applies. The Federal Labour Court did not answer this question conclusively, but merely stated that the requirement *also* applies to employees within the meaning of Section 5 (1) BetrVG. Moreover, there are no national derogations based on Article 17 (1) of Directive 2003/88/EC and the derogations governed in Sections 18-21 ArbZG – including executive employees pursuant to Section 5 (3) BetrVG – are explicitly not relevant. At present, it can therefore be assumed that the working time of executive employees **must** also be **recorded to the same extent**, whereby the Federal Labour Court points out that the occupational health and safety regulations and therefore also an obligation to record time resulting from Section 3 (2) no. 1 ArbSchG can only extend as far as working time law does not contain stricter and/or more specific provisions. It is therefore precisely at this point that we must hope that the legislature establishes such a norm. It should be noted that executive employees are not covered by the BetrVG, which is why potential **works agreements** do not **apply to them**.

4. Co-determination of the works council

The question of whether the works council has co-determination rights, and if so, which rights, has receded somewhat into the background. The Federal Labour Court's decision should not be misinterpreted to mean that the Court denies works councils any rights of co-determination in connection with the introduction and design of an operating working time recording system. Due to the now established legal obligation, the works council merely has **no right of initiative with regard to the general introduction of** the recording of working time.

When it comes to the specific design of the time recording system, i.e., the **"how"**, the works council can still be entitled to exercise a **wide range of co-determination rights**. In this respect, not only does Section 87 (1) no. 7 BetrVG (keyword: design and implementation of occupational health and safety requirements) come into question, but also co-determination under Section 87 (1) nos. 1, 2, 3 or 6 BetrVG. The works council will therefore continue to have a right of initiative with regard to co-determination in the design of the time recording system; what it cannot demand, on the other hand, is a specific, e.g., electronic, system to be procured – also, because this would interfere with the exclusive right of the employer to dispose of operating resources.

5. A sweet on the side

The practical consequences of the Federal Labour Court's judgment are comparable at least for the time being to those threatened by a third double in the board game "Monopoly" if one also has a "Get out of jail, free" card. The risk of an **immediate fine** or even **criminal liability for** violations does **not exist under** the current legal situation. Although compliance with the Occupational Safety and Health Act is subject to monitoring by the regulatory authorities, a violation of the obligations under Section 3 (2) ArbSchG is not subject to a fine under the current legal situation. It requires at least an order issued by the competent regulatory authority before sanctions can be imposed for non-compliance. If the legislature explicitly introduces a legal obligation to record working time, it will probably also stipulate sanctions for violations.

IV. Summary

By its assessment that the obligation to record working time is included in the Occupational Safety and Health Act, the Federal Labour Court to a certain extent has anticipated the legislature, even if modifications to the law are not ruled out in the future, but are even desirable and are also at least addressed (or rather recommended) by the Federal Labour Court in many places. Besides, more fuss is being made about the decision than necessary: if employers **already** maintain **a timekeeping system**, this will usually **meet** the **requirements**. The obligations to provide information, advice, and control in the event of the delegation of the recording requirement are also not a new invention but should actually have been standard practice for years. Those who do not yet have a working time recording system or who only have a working time recording system that complies with Section 16 (2) ArbZG should from now on – albeit with the necessary prudence – deal with the implementation of a system that complies with the above requirements, as it cannot be ruled out that the hint from the Federal Labour Court (also) was a wake-up call for the legislature and/or the regulatory authorities.

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New Work: “Workation” and “bleisure” – What is to be considered from a legal perspective?

The digitisation of our lives is increasingly breaking down the boundaries between private and professional life. A well-known example of this is the home office. However, employers are also facing numerous other trends in this regard. This includes “workation”, i.e., combining work and vacation as well as “bleisure”, i.e., combining business trips (“business”) and vacation (“leisure”). We would like to explore the legal framework that employers and employees must take into account in these new forms of mobile working.

Workation

Increasing digitisation and the big boost it received from the Corona pandemic have made teleworking arrangements, including mobile working and the working from home, almost a standard alongside the traditional way of working at the company’s premises. From this starting point it is not far to the so-called workation, i.e., combining work and vacation. In practice, this often means that employees express the desire to perform their work (from abroad) during or after their vacation. In other words, they simply relocate their home office to their vacation home in the sunny south or elsewhere. This raises the question of which legal framework must be taken into account in this context. Workation is the combination of teleworking – usually from abroad – with vacation. There are clearly a number of legal issues to be considered in this regard. In terms of employment law, it would first have to be clarified whether German law applies, and also which points are to be governed in the employment contract. In addition, social security and tax issues arise – just as they do, for example, in the case of secondments.

Working from a home abroad only temporarily, for example following a vacation, does not affect the habitual place of work

and thus the applicable law. However, this may be different if the employee wishes to work permanently or predominantly from abroad. In this case, the Rome I Regulation applies. A clear choice of law is recommended in any case. If the parties have not chosen the law applicable to the individual employment contract, the law of the country in which the employee habitually carries his work is decisive under Article 8 (2) Rome I Regulation. The decisive factor would then be the location of the home office and, above all, whether it is the habitual place of work. There is therefore already a need for regulation here. However, there is more to be governed in the employment contract. This already follows from Section 2 (2) of the Law on the proof of the essential conditions applicable to an employment relationship (*Nachweisgesetz*, in short "NachwG") where the employee performs his work outside Germany for a period longer than one month. Under this clause the duration of the work to be performed abroad, the payroll accounting and remuneration as well as the conditions of return of the employee must be specified. In addition, it is obvious that regulations be established regarding the place of work and the duration of the working periods in the country of residence and abroad in order to document the working days. Furthermore, the employment law issues that also arise in the "normal" domestic home office must be regulated (preferably under collective bargaining law). These include, for example, the definition of the group of eligible employees, the conditions for both utilisation and termination, as well as the documentation of working time, occupational health and safety and data protection.

However, in addition to these employment law issues, there are also social security and tax law implications that should not be overlooked. The applicable social security law depends, among other things, on whether the vacation location is within or outside of Europe and on the duration of the work to be performed by the employee from there. Article 13 of Regulation (EC) No 883/2004 on the coordination of social security systems is relevant here. Under this Article, the employee would have to pursue at least 25% of his activity as an employed person in Germany, provided that he has a place of residence in Germany and the employer is also situated in Germany in order for German social security law to continue to apply. If less than 25% of the work is performed in Germany, the employee would have to be resident in Germany and the employer would have to have its registered office in Germany. The parties to the employment contract must also bear in mind the A1 Certificate requirement for all forms of workation. This is especially true in light of the fact that some EU Member States have significantly tightened their national regulations and require that an A1 certificate be obtained before the employee begins working in their country. If, on the other hand, the home office is located outside the EU, the applicable social security law depends on the respective agreement concluded between the countries involved.

Finally, it must be clarified from a tax law perspective whether the employer's obligation to withhold wage tax in general or the amount to be withheld changes as a result of workation abroad. As a result, taxation continues to be assessed in Germany if the employee, who is resident in Germany and employed by a German employer, does not spend more than 183 days abroad. Another tax risk that employers must avoid at all costs is that of establishing a permanent establishment [*Betriebsstätte*] abroad, which would result in corresponding tax liabilities in the respective foreign country; furthermore, company car taxation may be affected.

In social networks, employees are sometimes encouraged to "start up their own business" and then work from abroad without any worries in order to partially circumvent the problems outlined. However, if an employee wishes to work for the (German) company as a freelancer from abroad, there is a risk of false self-employment, i.e., hidden dependent employment. This risk can materialise especially if the previous employer is the only client, there is unchanged access to all of the employer's systems or fixed working hours are specified. In particular, the agreement of fixed working hours is a sensitive issue to which attention should be paid because of their frequent necessity due to time differences, etc.

If the risk of dependent employment actually existing should materialise, this may result in the retroactive applicability of foreign social security law. In addition, employers can be hit with considerable costs for social security contributions and possibly fines in Germany and abroad. In addition, there is an enormous risk that a permanent establishment is created abroad. The existence of such a permanent establishment is assessed differently depending on the national law. Once a permanent establishment is in place, this gives rise to significant tax risks and additional costs and obligations for employers.

Bleisure

Private and business arrangements are also intermingled in the forms of so-called bleisure travel. In practice, the cases involve the combining of business trips with vacation or free time. Employees add a few days to their business trip, arrive earlier or simply take their partner with them. These cases

also give rise to employment, social security, and tax law issues.

For all legal issues, separating the business-related reason from the personal part is important in the case of bleisure travel. Insofar as this is business-related travel time, it is to be remunerated as working time. In addition to breaks, rest and sleep periods, other free time, i.e., the “leisure” components, would also have to be deducted from this. In addition to the working time subject to remuneration, it is also necessary to govern how the costs of the business and private parts are to be separated and who bears the respective shares of the costs. In the case of flight costs, for example, it would be conceivable for the employer to pay the flight costs in the amount in which they would have been incurred for a pure business trip. If the costs increase because the employee adds a few more days to the business trip, the employee would need to bear the additional costs incurred. From a social security law perspective, it must be remembered that, in case of doubt, health and accident insurance cover is only guaranteed for the business-related part of the trip. There is therefore no accident insurance cover if the insured employee devotes himself on the business trip to purely personal matters that can no longer be influenced by the basic insured activity (Federal Social Court Neue Juristische Wochenschrift (NJW) 2017, page 2858). Accordingly, the parties to the employment contract must ensure that neither unnecessary potential for dispute nor risks arise in this regard. Finally, separating the work-related part from the private part of the bleisure trip is also important with regard to tax law. Only travel, accommodation and other costs incurred on official business are eligible for reimbursement. The same applies to the issue of whether the employer’s reimbursement of travel expenses constitutes taxable wages.

In the case of a business trip followed by a vacation, the inward and outward travel costs must be divided accordingly (Federal Fiscal Court NJW 2010, page 891).

Conclusion

1. To prevent workation and bleisure from ending in contentious disputes, being subject to fines or leading to other unpleasant legal surprises for the parties involved, the parties to the employment contract must first and foremost be aware of the legal issues associated with it. This awareness is surprisingly often lacking in practice. If, on the other hand, there is such awareness, it quickly becomes clear to the parties to the employment contract that, in the case of bleisure business trips, for example, transparency as to what is business-related and what is personal is the top priority.

2. In general, the drafting of general rules and regulations such as a company agreement on home office and workation or a corporate travel policy is the best option. With such rules and regulations, the risks mentioned above can be contained and employer attractiveness can be increased at the same time. The latter is becoming increasingly important in view of the labour markets, especially since the trend toward workation and bleisure is more likely to increase than decrease.

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■ JUDGMENT IN REVIEWS

Unauthorised temporary agency work of foreign employees

The assignment of an employee from one company to work temporarily for another company requires a permit under the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*, AÜG). This also applies when employees from other EU Countries are assigned to Germany. If there is no German temporary agency work permit, this constitutes unauthorised temporary agency work. In the case of unauthorised temporary agency work of an employee from another EU Member State, an employment relationship is not established with the user undertaking (*Entleiher*) in Germany if the employment relationship of the temporary agency worker is governed by the law of another EU Member State.

Federal Labour Court, judgment of 26 April 2022 – 9 AZR 228/21

The case

The claimant was hired as an engineer/technical adviser in October 2014 by a French consulting group that focuses on technology consultancy. She is a French citizen and also lived in France. According to the employment contract, French law applied to the employment relationship. From 2014 to 2016, she worked as a consultant in a company of one of her employer's clients in Karlsruhe, Germany. Her employer was not in possession of a German temporary agency work permit. The employer terminated the employment relationship in 2019. The claimant then brought an action before the Karlsruhe Labour Court, claiming that she had had a permanent employment relationship with the company in Karlsruhe since 2014. She claimed that she had worked for the deployment company in Karlsruhe under an unauthorised temporary

agency work agreement. Her employment contract with her French employer was invalid due to the absence of a temporary agency work permit. The claimant was unsuccessful at first instance before the labour court. The Higher Labour Court upheld the claimant's appeal.

The decision

The admissible appeal on points of law by the defendant was successful before the Ninth Senate of the Federal Labour Court. The Federal Labour Court found that no employment relationship had come into existence between the German deployment company and the claimant. The fiction of an employment relationship between the user undertaking (Entleiher) and the temporary agency worker (Leiharbeitnehmer) in case of unauthorised temporary agency work presupposes that the employment contract between the temporary work agency (Verleiher) and the temporary agency worker is invalid pursuant to Section 9 no. 1 of the old version of the AÜG. However, if there is not an invalid employment relationship between the temporary work agency and the temporary agency worker under the applicable law, an employment relationship between the temporary agency worker and the user undertaking could also not be fictitious. The Federal Labour Court came to the conclusion that the employment relationship existing between the temporary work agency and the claimant was subject to French law. The choice of law made by the parties was permissible.

Neither the Act on Temporary Agency Work nor the Act on mandatory working conditions for workers posted across borders and for workers regularly employed in Germany (Arbeitnehmer-Entsendegesetz, AEntG) stipulate that Section 9 no. 1 of the old version of the AÜG took precedence over foreign law, the Court held.

Section 9 no. 1 of the old version of the AÜG is no overriding mandatory provision within the meaning of Article 9 (1) Rome I Regulation. Therefore, the AÜG does not grant temporary agency workers who are transferred from another Member State of the European Union to Germany any protection beyond Section 2 of the old and new versions of the AEntG. The public interest in compliance with Section 1 (1) sentence 1 of the old version of the AÜG was sufficiently safeguarded by the fact that the lack of a permit pursuant to Section 16 (1) no. 1 and (2) of the old version of the AÜG was punishable by a fine as an administrative offence. Therefore, based on the employment relationship with the contractual employer, which is valid under French law, a further employment relationship is not established with the user undertaking in Germany. The co-existence of a temporary agency work employment contract and a fictitious employment relationship is ruled out, in the view of the Court.

Our comment

The decision of the Federal Labour Court is of high practical relevance, as the cases of the cross-border temporary agency work of foreign employees is increasing in times of a dynamically changing globalised world of work. If employees of a third party are deployed in the company, extreme caution is regularly required with regard to the risk of concealed temporary agency work under German law. This also applies to cases in which employees from abroad work for companies in Germany. Even in these cases, depending on the structure of the assignment of the employees, this may result in concealed temporary agency work. The decisive factor here is not the content of the contract agreed by the parties, but the contractual practice. Employers should therefore carefully examine the content of the contract and the planned implementation of the contractual relationship in advance of the deployment. Even in current contractual relationships, the contractual practice should be regularly reviewed in order to exclude the risks of concealed temporary agency work. The Federal Labour Court's convincingly and extensively reasoned decision is thus to be welcomed due to the far-reaching consequences of concealed temporary agency work. With its decision, the Federal Labour Court has given somewhat of an all-clear signal for cases in which an employment relationship exists that is valid under foreign law. In these cases, at least an employment relationship with the domestic temporary work agency is not fictitious despite the existence of concealed temporary agency work. Nevertheless, even these are cases of unauthorised temporary agency work for which, above all, there is the threat of high fines. The decision also applies – even if it still refers to the old legal situation under the AÜG in its version valid until 31 March 2017 – to the current legal situation.

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Bans on headscarves and the CJEU – essentially nothing new

The ban on the visible wearing of religious signs in companies is not unlawful without further ado.

CJEU decision of 13 October 2022 – C-344/20 (legal case SCRL)

The case

In March 2018, the claimant, who is of Muslim faith and wears a headscarf, applied to the defendant, which manages social housing in Belgium, to complete an internship there as part of her vocational training.

After an interview, the defendant informed the claimant that her application was considered positive, but at the same time referred to the company's internal neutrality rules, under which all employees must take care not to express their religious, ideological or political convictions through words, clothing or in any other way. The claimant stated that she would not agree to remove her headscarf when on the defendant's premises in order to comply with these neutrality rules and her application was subsequently rejected.

A month later, the claimant again applied for an internship with the defendant and offered to wear a different type of head covering instead of the headscarf. The defendant also rejected this application on the grounds that no type of head covering was permitted on its business premises. The claimant then reported the defendant to the anti-discrimination body and brought an action for a prohibitory injunction before the French-speaking labour court in Brussels, which initiated preliminary proceedings before the Court of Justice of the European Union (CJEU) under Article 267 of the Treaty on the Functioning of the European Union (TFEU).

The decision

In its decision from 13 October 2022, the Court confirms its case law of the past years. The Court finds (again) that a company's internal neutrality rules that prohibit employees from expressing their religious or ideological convictions through

words, clothing or in any other way do not constitute direct discrimination if these rules are formulated and applied generally as well as in an undifferentiated way.

In addition, the Court then addressed the question of whether such neutrality rules constitute indirect discrimination: the CJEU also ruled that this was not the case, as long as the difference in treatment is objectively justified by a legitimate purpose and the means of achieving this purpose are necessary and appropriate. The Court recognises that the employer's effort to display neutrality to the outside world – as part of the protected entrepreneurial freedom (Article 16 of the Charter of Fundamental Rights of the European Union) – may constitute a legitimate purpose. However, it is also necessary for the employer to have an actual interest in the neutrality policy, the existence of which it must prove.

In the Court's opinion, the conflicting interests must be balanced on a case-by-case basis in order to determine whether indirect discrimination exists. In this context, religion or ideology may be accorded greater importance in individual cases than the employer's entrepreneurial freedom, insofar as this results from national law. National constitutional provisions that protect freedom of religion may therefore be included as more favourable provisions in the balancing process within the meaning of Article 8 of Council Directive 2000/78/EC. The Court therefore found that the Member States are granted a certain margin of discretion in this regard. However, this does not go as far as allowing the grounds of discrimination "religion or belief" set out in Article 1 of Council Directive 2000/78/EC to be split into two different grounds of discrimination. Rather, according to the judges, it is a single ground of discrimination that encompasses religious as well as ideological and spiritual beliefs. The wording, context and purpose of the ground of discrimination would otherwise be called into question and the effectiveness of the general framework for achieving equal treatment in employment and occupation would be compromised.

Our comment

With this decision, the CJEU remains faithful to its previous case law relating to headscarf bans, but does not make any key statements that have not already been made elsewhere. On reading the judgment, the question arises as to why the referring court had reason to initiate a request for a preliminary ruling in the first place. The background is explained by the CJEU itself: the referring court was of the opinion that the CJEU's previous rulings on these issues raised "serious questions" about how to establish a comparability standard in the context of discrimination. If – as the CJEU already emphasised in the WABE case (CJEU 15 July 2021, C-804/18 and C-341/19, para. 47) – religion and belief were "two facets of the same single ground of discrimination", this would lead to a considerable restriction of the area within which a comparable person could be found.

However, the CJEU does not see the problems identified by the referring court (paragraph 59 et seqq.): "*[T]he existence of a single criterion encompassing religion and belief [does] not preclude comparisons between workers with religious beliefs and workers with other beliefs, nor between workers with different religious beliefs*." Rather, the only decisive factor is that the less favourable treatment is based on religion or belief – in the wording of the Council Directive, that is, "because of" the characteristic.

It is not expected that this judgment will have any effect on German case law practice. The Federal Labour Court already requires not only proof that a legitimate aim is being pursued by the ban, but also that there was or currently is a specific risk regarding this aim. However, it is expected that those Member States, in which secularism has a significantly greater position, and in some cases is even constitutionally assured (e.g., France and Portugal), may be impacted to a significant extent.

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Claim for compensation possible where approval is not obtained from the Integration Office

If a severely disabled employee or an employee with equal status as a severely disabled person is to be dismissed, this requires the prior approval of the Integration Office. If this is not obtained, this may give rise to the presumption that the disadvantage experienced by the severely disabled employee/employee with equal status as a result of the dismissal occurred because of the severe disability, and result in claims for compensation.

Federal Labour Court, judgment of 2 June 2022 – 8 AZR 191/21

The case

The parties are in dispute about the employer's obligation to have to pay compensation in the amount of at least EUR 3,500 pursuant to Section 15 (2) of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) due to discrimination because of the employee's severe disability. The dispute was preceded by the employer's dismissal of the employee without first obtaining the approval of the Integration Office and without first carrying out a prevention procedure. The official recognition of the employee's severe disability had neither been applied for nor granted at the time the notice of termination was issued. In this respect, however, the employee invoked the obviousness of the existence of a severe disability and accordingly asserted discrimination because of his severe disability – which was actually recognised in the course of the proceedings.

The decision

The action was unsuccessful at all instances. The Federal Labour Court confirmed at the last instance that the employee has no claim against the employer for payment of compensation pursuant to Section 15 (2) AGG.

Although, in the opinion of the federal judges, the employee had been disadvantaged by the notice of termination, he had not suffered this disadvantage because of his severe disability. The employee had not provided sufficient indications or evidence to suggest that he had been discriminated against because of his severe disability. At the time the notice of termination was issued, the claimant's status as a severely disabled person / person of equal status had not been established nor had the severe disability been obvious or evident. Accordingly, Section 168 of the Social Code IX (*Sozialgesetz-*

buch), which stipulates that the Integration Office must give its prior approval to an intended termination, did not apply. A claim for compensation due to a violation of the obligation that may exist to carry out a prevention procedure under Section 167 (1) SGB IX can also not be identified, since the employee did not inform the employer about an existing established or obvious severe disability. Accordingly, the severe disability could not have been a "component of the bundle of motives" that had (partly) influenced the employer's decision to terminate the employment contract. Finally, in the BAG's opinion, Section 167 (2) SGB IX (occupational integration management) is not a provision that could give rise to the presumption that discrimination because of a severe disability has occurred. Since further circumstances cited by the employee did not give rise to a presumption of discrimination because of the severe disability, the action was ultimately dismissed.

Our comment

The Federal Labour Court continues and expands its previous case law. According to established case law, the employer's violation of regulations containing procedural and/or support obligations in favour of severely disabled persons regularly gives rise to the presumption of discrimination because of the severe disability. In the Federal Labour Court's opinion, these breaches of duty are in principle likely to create the impression that the company is not interested in employing severely disabled persons.

With the present decision, the Federal Labour Court at least clarifies that the requirement for approval pursuant to Section 168 SGB IX also constitutes a procedural and/or support obligation in the aforementioned sense. The dismissal of a severely disabled person without the prior approval of the Integration Office thus gives rise to a presumption of discrimination and may result in corresponding claims for compensation under Section 15 (2) AGG. The fact that the claim for compensation was nevertheless rejected in the present case is due to the circumstances of the individual case, which cannot be applied generally.

In addition to the per se invalidity of a dismissal of a severely disabled employee or an employee with equal status issued without the prior approval of the Integration Office, there is therefore also the risk that employers who act in breach of their duties will be faced with corresponding claims for compensation. This must be borne in mind, probably also in arrangements in which the parties to the employment contract actually agree on the "amicable" termination of the employment relationship by way of notice and ignoring Section 168 SGB IX.

Against this backdrop, reference is also made to a comparable decision of the Hesse Higher Labour Court of 8 August 2022 by way of resolution (16 TaBV 191/21). It was held in this case that it may constitute a gross breach of duty on the part of the employer under Section 23 (3) of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG) if notices of termination are issued without first consulting the works council formed in the company under Section 102 (1) BetrVG. The legal consequence of this is a corresponding right of the works council to seek injunctive relief, which may be accompanied by an administrative fine of up to EUR 10,000.00.

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Default of acceptance by the employer after submission of a negative PCR test

The employer is in default of acceptance if it issues a 14-day ban on entering the company premises to an employee returning from a SARS-CoV-2 risk area, even though the employee is not required to self-isolate (go into quarantine) under the regulatory requirements upon entering Germany, if a current negative PCR test and a medical certificate stating that the employee has no symptoms are submitted. The employer is then liable to continue to pay remuneration to the employee pursuant to Sections 615 sentence 1 and 611a (2) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).

Federal Labour Court, judgment of 10 August 2022 – 5 AZR 154/22

The case

The parties were in dispute about the remuneration payable for default of acceptance for the period from 17 August to 28 August 2020.

A hygiene concept was in place at the defendant's business during this period. Under this hygiene concept, persons returning from a risk area would not be allowed to enter the business premises for a period of 14 days. Similar matters were regulated by the Ordinance for the containment of the spread of SARS-CoV-2 (*SARS-CoV-2 Eindämmungsmaßnahmenverordnung*) of the Land Berlin of 16 June 2020. The Ordinance required in principle that returning travellers from a risk area go into quarantine for a period of 14 days. This did not include persons who had a negative PCR test no more than 48 hours prior to entering Germany and did not have any symptoms. There were no statutory provisions at national level requiring returning travellers to go into quarantine.

The claimant was on leave in Turkey from 11 to 15 August 2020. Turkey was classified as a COVID-19 risk area by the Robert Koch Institute during this period. Before leaving the country on 13 August, and immediately after arriving in Germany, he took a PCR test, which was negative in each case. He was also able to prove that he did not have any symptoms by presenting a medical certificate.

When the claimant went to the company's business premises on the first day after his leave, on 17 August 2020, he was immediately sent home – with reference to the hygiene concept. In a letter dated 21 August 2022, the defendant informed the claimant that he was not allowed to enter the business premises for the period up to and including 29 August 2020 but could continue to receive remuneration by taking leave during this period. The claimant's working time account showed an absence due to the taking of leave during the period in dispute.

The claimant sought remuneration for default of acceptance in the gross amount of EUR 1,512.47 for the period from 17 August to 28 August 2020. The action was successful at first and second instance.

The decision

The Federal Labour Court dismissed the defendant's appeal on points of law. The claimant may seek remuneration for the disputed period for default of acceptance pursuant to Sections 615 sentence 1 and 611a (2) in conjunction with Section 293 et seq. BGB.

The claimant actually offered his services by appearing at the business premises on 17 August 2020.

Furthermore, the claimant was not unable to provide the contractual performance, Section 297 BGB. He was willing and capable of performing his duties.

The ability to perform requires that the employee be actually and legally capable of performing the work owed. Legal incapacity exists, for example, if there is a statutory prohibition on employment. This was rejected by the Federal Labour Court.

On the one hand, there was no quarantine requirement under public law because the claimant was exempt from the provisions of the Ordinance for the containment of the spread of SARS-CoV-2 of the Land Berlin because of the negative PCR tests and his symptom-free status.

On the other hand, the ban on entering the company's business premises did not lead to an inability to work within the meaning of Section 297 BGB. This is because the defendant itself was the cause of the inability. If the employer is responsible for the failure to perform, it is required in principle to pay remuneration for default of acceptance.

The Federal Labour Court further stated that acceptance of the work performance was also not unreasonable for the defendant in an exceptional case. The defendant had not presented any specific operational circumstances that could have justified unreasonableness. Instead, it relied solely on the hygiene concept in place – irrespective of the individual case. The aim of the hygiene concept was to significantly reduce the risk of the virus spreading through the business premises. This was not sufficient to justify unreasonableness. This is because other, less severe measures were available to the defendant to achieve this aim. It could have therefore issued a ban on entering the business premises with continued payment of the remuneration. It could have also requested that another recent negative PCR test be submitted.

The entitlement to remuneration is also not extinguished by performance. Although the claimant received remuneration from the defendant for the leave taken during the period in dispute pursuant to Section 1 of the Federal Leave Act (*Bundesurlaubsgesetz*, BUrlG) in conjunction with 611a (2) BGB, the fulfilment of the leave entitlement requires a leave of absence granted by the employer, which was lacking in this case. The employee must be able to recognise that the employer wishes to release him/her from the obligation to work in order to fulfil the leave entitlement. The informing of the claimant by the defendant that he/she has the option to continue to receive remuneration by taking leave days does not satisfy these requirements.

Our comment

The coronavirus pandemic will keep the courts busy for a long time to come, as it continues to raise new legal issues – especially in employment law. The special feature of this case was that the employee was unable to carry out his work not because of an officially ordered closure of the business, but because of a ban on entering the company's business premises imposed by the employer. There was therefore no legal incapacity. This was illustrated by the Court in textbook fashion. The judgment clearly shows that the organisation of occupational health and safety falls under the remit of the employer and concerns its economic or business risk. The fear of the spread of the coronavirus does not afford the possibility of disregarding all legal principles. The employer must instead implement infection protection at its reasonable discretion and taking less severe measures into account.

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Inclusion of restricted stock units in the calculation of compensation for observing a non-compete covenant (*Karenzentschädigung*)?

The Federal Labour Court clarifies its previous case law.

Federal Labour Court, judgment of 25 August 2022 – 8 AZR 453/21

In its judgment of 25 August 2022, the Federal Labour Court decided that restricted stock units (RSU) granted by the parent company of a group are not taken into account when calculating compensation for observing a non-compete covenant where a post-contractual non-competition clause has been agreed if the employee is employed by a subsidiary. The RSUs granted by the parent company are not a contractual benefit granted by the employer. This shall not apply if the employer itself has expressly or implicitly entered into a (co-)obligation.

The facts of the case

The claimant was employed by the defendant or its legal predecessor from 2012 to 2020. The defendant is a member of a group of companies whose parent company is a U.S. company.

The parties agreed to include a group-wide nine-month post-contractual non-competition clause in the employment contract. In return, the defendant undertook to pay the claimant compensation for observing this non-compete covenant "*equal to half of the contractual benefits last received by the employee for each year of the ban*". In addition, the application of Sections 74 et seq. of the German Commercial Code (*Handelsgesetzbuch,* HGB) was agreed.

During his employment, the claimant received RSUs from the U.S. parent company on the basis of agreements concluded separately with the latter. These are restricted stock acquisition rights with staggered transfer dates. The RSUs were not the subject of the employment contract nor any other agreement between the claimant and the defendant.

The employment relationship between the claimant and the defendant ended in January 2020. The claimant complied with the agreed nine-month post-contractual non-competition clause. In return, he received compensation for observing the non-compete covenant. The RSUs were not included by the defendant in calculating this compensation. As a result, the compensation paid was significantly lower than it would have been if the RSUs had been included. The claimant then took the defendant to court for payment of this difference. He ar-

gued that it was irrelevant whether the defendant itself or its parent companies owed the RSUs. The parent company was able in any event to influence the contractual terms of the employment relationship between him and the defendant.

After both the Minden Labour Court (judgment of 17 February 2021 - 3 Ca 470/20) and, at the second instance, the Hamm Higher Labour Court (*Landesarbeitsgericht*, LAG) (judgment of 11 August 2021 - 10 Sa 284/21) had dismissed the claim as unfounded, the judges of the Federal Labour Court in Erfurt had to deal with the question of the inclusion of the RSUs. This is because the Hamm LAG had allowed the appeal on points of law on the grounds that there has been a lack to date of case law from the highest courts and that its decision deviates from a previous decision made by the Hesse LAG (see Hesse LAG, judgment of 31 May 2017 - 18 Sa 768/16). The Hesse LAG had still taken the view that there were strong arguments for not limiting the contractual benefits to those claims which the employee could demand directly from his employer. It is quite common in the case of group-related employment relationships for part of the performance-related remuneration to be paid by a group company other than the contractual employer.

The decision

With the judgment of 25 August 2022, the dispute over the interpretation of the remuneration to be included was decided by the highest court in Erfurt. The appeal on points of law of the claimant before the Eighth Senate of the Federal Labour Court was unsuccessful. The Federal Labour Court agreed with the opinion of the LAG Hamm and rejected the claimant's claim for payment of the difference. This is because, in the opinion of the Erfurt judges, the RSUs are not contractual benefits that are to be included when calculating the compensation for observing the non-compete covenant. The clause in the claimant's employment contract reproduces the wording of Section 74 (2) HGB. It must therefore be interpreted to mean that the compensation for observing the non-compete covenant only includes those benefits which are granted to the employee as remuneration by the contractual employer in return for the work performed. This results from the character of the employment contract as an exchange relationship. The RSUs were not the subject of this exchange relationship, but were granted to the claimant by a third party – the group parent company. This also confirms that it is not the defendant but the group parent company that is a party to the agreement on the RSUs. In order to justify the inclusion of the RSUs in the calculation of the compensation for observing the non-compete covenant, an explicit or at least implied (co-)obligation on the part of the defendant with regard to the granting of the RSUs would be required. In the Federal Labour Court's opinion, the mere fact that a group-wide non-competition clause was stipulated in the employment contract did not satisfy this requirement. Assuming that the group-wide non-competition clause was not justified by the defendant's legitimate business interests, this would merely lead to a reduction in the restriction regarding the permissible scope of the prohibition under Section 74a (1) HGB. However, this did not result in the claimant, even if he had complied with the group-wide non-competition clause, being entitled to compensation for observing the non-compete covenant, including the RSUs.

With this decision, the Federal Labour Court continues its case law on the granting of RSUs to employees and clarifies it. The Erfurt judges had already decided on several occasions that agreements regarding the granting of RSUs are legally independent of an employment relationship between employer and employee if an employee has concluded an agreement with another group company regarding the granting of these RSUs. Claims arising from this agreement can then in principle only be asserted against the company that is party to the agreement (see Federal Labour Court, judgment of 12 February 2003 - 10 AZR 299/02; Federal Labour Court, judgment of 16 January 2008 - 7 AZR 887/06).

Practical tips

The Federal Labour Court's decision is to be welcomed. With this decision, the court continues its case law and provides clarity regarding the inclusion of benefits in the calculation of compensation for observing a non-compete covenant. In practice, employees who are employed by a subsidiary of a group of companies often receive benefits from other group companies. The question of how the provision of such benefits affects the calculation of compensation for observing a non-compete covenant is therefore highly relevant for a large number of employers. In addition, in the highly competitive candidate market, the number of contractual agreements regarding post-contractual non-competition clauses in employment contracts is increasing to prevent former employees from becoming competitors. A supreme court decision in this context was thus desirable, particularly from the employers' point of view.

It has now been finally clarified that another subsidiary is not liable under employment law if RSUs are granted by the parent company of the group. It cannot be concluded from the mere fact that these are granted because of the existing em-

ployment relationship that they are therefore automatically remuneration components. It is only consistent to also apply this differentiation when calculating compensation for observing a non-compete covenant. In this context, the decisive factor is whether the employer, as a member of a group of companies, has at least (co-)committed itself with regard to the granting of the RSUs. In order to avoid the impression of such a (co-)obligation on the part of the employer, it is advisable to pay strict attention when concluding contracts that any RSUs granted to the employee of a subsidiary are promised and granted solely by the parent company of the group. An agreement on RSUs and the employment relationship should be strictly separated. For this reason, neither the employment contract nor a possible termination agreement should contain references to the RSUs. At most, a termination agreement should include the clarification that these remain unaffected by the agreement. In order to avoid the impression that subsidiaries are contractually obligated as contractual employers with regard to RSUs, correspondence in this regard should also be conducted exclusively between the parent company and the respective employees.

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No hardship allowance due to the wearing of a surgical mask

Employees who wear a prescribed respiratory protective mask as personal protective equipment while performing their work are entitled to a hardship allowance under Section 10 no.1.2 of the Framework Collective Agreement for commercial employees in building cleaning (*Rahmentarifvertrags für die gewerblich Beschäftigten in der Gebäudereinigung,* RTV). A medical face mask (so-called surgical mask) does not meet these requirements.

Federal Labour Court, judgment of 20 July 2022 – 10 AZR 41/22

The case

The claimant was employed by the defendant as a cleaner. The provisions of the Framework Collective Agreement for commercial employees in building cleaning dated October 31, 2019 (RTV) apply to the employment relationship of the parties on the basis of the declaration of general applicability. Section 10 No. 1.2 RTV provides for a hardship allowance, inter alia, for work where a prescribed respiratory protective mask is used. Due to the COVID-19 pandemic, the claimant wore a medical face mask on the defendant's instructions

when carrying out cleaning work in the period from August 2020 to May 2021. He demanded a collectively agreed hardship allowance of 10% of his hourly wage for this under the relevant provision of the collective bargaining agreement. He was of the opinion that wearing a medical face mask at work also constituted a hardship that should be compensated for by the hardship allowance. The medical face mask is a respiratory protective mask within the meaning of Section 10 no. 1.2 RTV, because it also reduces the risk of the wearer being infected. The Berlin Labour Court and the Berlin-Brandenburg Higher Labour Court (*Landesarbeitsgericht*, LAG) dismissed the action. With his appeal on points of law, the claimant continued to pursue his claim.

The decision

The appeal was unsuccessful. The Federal Labour Court decided that a medical face mask does not meet the requirements set out in Section 10 no. 1.2 RTV relating to a respiratory protective mask. This is based on the interpretation of the collective agreement. The claim asserted is already contradicted by the wording. The provision of the collective agreement ties in with the relevant provisions of occupational health and safety law - Section 618 of the Civil Code (*Bürgerliches Gesetzbuch*, BGB), Sections 3 et seq. of the German Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work (*Arbeitsschutzgesetz*, ArbSchG). Section 3 (1) ArbSchG stipulates that employers are required to take protective measures with regard to their employees. Under the relevant implementing regulations, the term respiratory protective mask therefore only includes such a mask that primarily protects employees from a risk to their safety and health and comes under the so-called personal protective equipment (PPE).

Medical face masks do not meet these requirements. According to their classification under the regulations clarifying the PPE Usage Ordinance (*PSA-Benutzungsverordnung* - PSA-BV), namely the occupational health rules, the SARS-CoV-2 Occupational Health and Safety Rule (*SARS-CoV-2-Arbeitsschutzregel*), the SARS-CoV-2 Occupational Safety Regulation (*SARS-CoV-2-Arbeitsschutzverordnung*) and the Rule 112-190 of the German statutory accident insurance association DGUV, they primarily serve to protect others and not oneself. In the Federal Labour Court's opinion, the interpretation is confirmed by the collective agreement system. Under Section 10, Sentence 1 of the RTV, there is only an entitlement to the hardship allowance if the relevant occupational health and safety regulations are complied with. According to the intention of the parties to the collective agreement, not every hardship should be compensated for, but only such a hardship where the type of work requires the wearing of a respiratory protective mask. There is therefore no entitlement to the collectively agreed hardship allowance under the RTV when wearing a medical mask.

Our comment

During the Corona pandemic, the wearing of a protective face mask was required by law for a temporary period of time, even in the workplace. The Federal Labour Court now dealt with the question of whether employees are entitled to payment of a collectively agreed hardship allowance for wearing a medical face mask (so-called surgical mask) during working hours, which is provided for where the work requires the wearing of a respiratory protective mask. In the Federal Labour Court's opinion, this is not the case if the collective agreement provision is linked to the standards of occupational health and safety law.

The Federal Labour Court's decision provides a welcome clarification in practice and, with its case law, also confirms other decisions of lower courts which had already reached similar conclusions, such as the Schleswig-Holstein Higher Labour Court (judgment of 10 November 2021 - 6 Sa 102/21). In the case decided by the Schleswig-Holstein Higher Labour Court, the relevant collective bargaining agreement provided for the payment of a hardship allowance for wearing a specified respiratory protective mask. The Schleswig-Holstein Higher Labour Court was also of the opinion that such a respiratory protective mask is always distinguished by self-protection it provides to employees against inhalation of toxic gases, dust particles or the like that are triggered by the work. Since a medical mask does not serve this purpose, the Higher Labour Court rejected the claim for a hardship allowance.

However, the Federal Labour Court did not comment on the question of whether a hardship allowance is to be paid for wearing an FFP2 mask. As a well-fitted, close-fitting mask, the FFP2 mask provides suitable self-protection against infectious aerosols. In addition, breathing is significantly constrained in contrast to the surgical mask. An initial assessment of this has been made by the Baden-Württemberg Higher Labour Court (judgment of 15 May 2022 - 12 Sa 91/21). According to this judgment, the wearing of an FFP2 mask for reasons of protection against infection primarily serves to protect other persons and only indirectly the wearer as well, whereas the provisions of the collective agreement exclusive-

ly aim to protect the employee himself. The wearing of an FFP2 mask with regard to the risk of being infected with the coronavirus does not therefore constitute a hardship subject to allowances within the scope of application of the regional regulations. It remains to be seen whether and how Germany's highest labour court will position itself on this issue.

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■ CASE LAW IN A NUTSHELL

Pro-rata payment of a promised annual bonus when an employee leaves the company

Cologne Higher Labour Court, judgment of 7 July 2022 – 6 Sa 112/22

An agreed annual bonus that is contingent on the employee's performance for the entire year must be reduced on a pro rata basis if the employee leaves the company before the end of the reference year. This also applies if the employee has already fully met the annual target at the time of his leaving.

Reasons for the decision

The parties are in dispute about the payment of variable remuneration. The claimant was employed by the defendant in the period from 1 January 2001 to 31 July 2021. The employment contract signed at the beginning of the employment relationship provided for the payment of a variable bonus, the amount of which was determined by the company. The bonus was purely in the nature of remuneration and was not a bonus that is paid irrespective of a result. The employment contract also stipulated that, after notice of termination has been given, the entitlement to a variable bonus would only exist for the period prior to receipt of the notice of termination. It made no difference whether the termination was initiated by the employee himself or by the company. In March 2021, the parties concluded the target agreement, upon achievement of which the bonus in dispute was to be paid. In the agreement, two target agreements were made separately in the target achievement period from 1 January 2021 to 31 July 2021 at the latest, which was identical to the claimant's leaving date. The claimant fulfilled 120% of the individual targets. After the termination of the employment relationship, the claimant was informed that he would receive the performance component for 2021 on a pro rata basis for seven months.

The claimant brought a legal action for the payment of the full annual bonus for 2021, as he was of the opinion that the bonus payments were made for the targets achieved and not for a specific period of time.

The Cologne Higher Labour Court (*Landesarbeitsgericht*,

LAG) did not agree with his legal opinion. It decided that the annual bonus should be reduced by 5/12 of the full entitlement on a pro rata basis. The Court explained that claims for remuneration arising from an employment relationship pursuant to Section 611a (2) of the German Civil Code *(Bürgerliches Gesetzbuch*, BGB) require an existing employment relationship and the due date of remuneration pursuant to Section 614 sentence 2 BGB. It follows from the exchange nature of the employment relationship that the entitlement to remuneration lapses if the employee does not perform the work that is owed. As soon as the employment relationship is terminated, claims for remuneration can no longer arise. The entitlement was to be reduced by the months during which he no longer worked. The fact that the targets set had already been achieved by the agreed period was only a (necessary) precondition and did not result in the employee not having to work the entire year for the full entitlement.

No review of provisions of collective bargaining agreements that apply to an employment relationship concerning the law governing general terms and conditions

If a collective bargaining agreement applies to an employment relationship on the basis of a global reference in the employment contract, the provisions of the collective bargaining agreement are not subject to review on the basis of Sections 305 et seq. BGB if the collective bargaining agreement covers the employment relationship in its geographical, technical and personal scope.

LAG Baden-Württemberg, judgment of 10 August 2022 – 10 Sa 94/21

The parties are in dispute about compensation payments for “mobbing”. The claimant was employed by the defendant as a secretary/assistant to the management board of the business division. The Collective Bargaining Agreement for Employees in the Metal and Electrical Industry in South Württemberg-Hohenzollern (*Manteltarifvertrag für die Beschäftigten in der Metall- und Elektroindustrie in Südwürttemberg-Hohenzollern*, MTV) was applicable to her employment contract. Under Section 18 of the MTV, a limitation period applied, under which claims for bonuses have to be asserted within two months of the due date. All other claims must be asserted within six months of the due date, but no later than three months after termination of the employment relationship. The employee resigned from her position on 31 March 2019, and subsequently asserted a claim for damages for pain and suffering caused by alleged mobbing by her supervisor. The legal action filed by the claimant was served on the defendant on 26 May 2021. She submitted that constant conflicts with her supervisor had led her to suffer a delayed onset of an adjustment disorder with depressive symptoms. Her general right of personality and her health were thereby violated. The competent labour court dismissed the action because the claimant had not asserted that she had been harmed by the defendant’s managing director as its executive body, but by employees of the defendant. In addition, the limitation period stipulated in the collective agreement was not observed. The Higher Labour Court confirmed this legal opinion. In this case, the limitation period provision also covers claims arising from liability due to intent. The last act of bullying alleged by the claimant occurred at the latest when the notice of termination was issued on 19 November 2018. The claim arose and became due with the termination of the employment relationship on 31 March 2019. The limitation period therefore ended on 30 June 2019. Although, under Section 202 (1) BGB, the statute of limitations in the case of liability due to intent cannot be relaxed in advance by a legal transaction, this only applies in the case of contractually agreed limitation periods, which are then null and void. Section 202 (1) BGB does not preclude the application of collective bargaining provisions. A review of the general terms and conditions on the basis of Section 305 et seqq. BGB also did not take place. Pursuant to Section 310 (4) sentence 3 BGB, collective bargaining agreements are exempt from a review under the law governing general terms and conditions. It follows from this that the limitation period only partially infringes higher-ranking law and otherwise remains effective.

Compliance with the Working Time Act (Arbeitszeitgesetz, ArbZG) in the case of trust-based working time: works council's right to information on working hours of field staff

A local works council is entitled to receive certain information from the employer about the working hours of field staff on trust-based working time. Trust-based working time allows flexible hours to be worked, but only within the scope of the working time laws.

Munich Higher Labour Court, decision of 11 July 2022 – 4 TaBV 9/22

In the proceedings before the Munich Higher Labour Court, the parties were in dispute about the right to information. Many of the almost 500 employees worked in the field in the defendant's business division, which operated a mobile and fixed telephone network. Since 2009, the company agreement stipulated for the field staff that they worked on a trust-based working time model, whereby they could record their working hours themselves and the employer did not record their time. The field staff were required to observe operational concerns and to compensate for any variances from the target working time independently. They were also to comply with the regulations of the Working Time Act and carry them out independently. In addition, they were to write down all work days on which they had worked more than eight hours, excluding breaks. The employer was of the opinion that it could not comply with the works council's request to release the information on the exact working hours. In the case of trust-based working time, there would be no records and thus no information that could be released.

The Munich Higher Labour Court did not agree with the employer's legal position and upheld the works council's right to information. The trust-based working time model would not conflict with the issuing of information regarding the recording of working time. The works council has the right to do so based on its monitoring duties pursuant to Section 80 (1) no. 1 of the Works Constitution Act (*Betriebsverfassungsgesetz*, BetrVG), under which it has to monitor whether the laws applicable in favour of the employees are complied with. This includes the Working Hours Act. The information to be communicated includes the information on the start and end of the daily working hours, overtime and minus hours compared to weekly working hours as well as the hours worked on Sundays and holidays. The start and end of the working time must be communicated to the works council in order for it to be able to monitor the specified rest periods under Section 5 (1) in conjunction with Section 7 (1) no. 3 of the Working Time Act. The works council's right to timely and comprehensive information is derived from Section 80 (2) no. 1 BetrVG. Even the fact that the employees' working hours are not recorded does not preclude the right to information. In this case, this would result from the fact that the employer does not have the data only because it does not want to collect such data. Trust-based working time and the recording of working time would not be incompatible.

Jurisdiction of the labour courts where there is a matrix structure in a group of companies

The labour courts have jurisdiction over an action brought by an employee against his contractual employer even if the employee has been appointed managing director of two other companies belonging to the group within the matrix structure of a group of companies.

Cologne Higher Labour Court, judgment of 14 July 2022 – 9 Ta 68/22

The defendants are in dispute about the validity of a notice of termination. The claimant had been employed by the defendant under an employment contract as the head of the Institute for Traffic Safety since October 1998. In 2011, the claimant was promoted to head of the global business unit M.04 Development/Type Testing as a result of the restructuring of T Group's matrix organisation. As head of the business unit, the claimant was responsible for managing the relevant teams in Europe as well as large teams in China, Japan, Korea and North Korea. In September 2013, he assumed the additional task of Global Business Unit Manager M.04, managing the company in Luxembourg and Berlin. His most recent total monthly compensation amounted to EUR 18,586. The defendant terminated the employment relationship as of 31 July 2022. The employee then filed an action against unfair dismissal with the Cologne Labour Court, claiming that the termination was invalid. He sought continued employment under the employment relationship.

The defendant challenged the admissibility of the legal action. In this regard, it submitted that a single employment relationship had been established. The claimant had exercised the powers of a management body of a legal company and received a uniform remuneration. He was therefore not an employee under Section 5 (1) sentence 3 of the Labour Court Act (*Arbeitsgerichtsgesetz*, ArbGG), which is decisive for bringing a legal action in the labour courts.

The Higher Labour Court dismissed the defendant's immediate complaint against the decision of the Labour Court as unfounded.

The claimant is considered to be an employee. The admissibility of the legal action is based on Section 2 (1) nos. 3 a) and b) ArbGG, without it being relevant whether the claims are a so-called sic-non case. Since, in such a case, the asserted claim can only rely on a basis of claim which clearly falls within the jurisdiction of the labour courts, the substantiated assertion of the claimant that he is an employee is sufficient. The appointment as managing director of the subsidiary did not change the employee status. The claimant continued to work for the defendant as head of the global business unit. The original employment contract was the basis for the appointment to management, which the defendant had expressly made clear. Under the established case law of the Federal Labour Court, managing directors generally work under a freelance service contract. The cross-company combination of employee and managing director duties also does not give rise to a uniform employment relationship. The integration of the claimant and his duties in a matrix structure would not change this.

Termination invalid despite grossly insulting remarks being made

Despite grossly insulting remarks being made about superiors and colleagues, subsequent termination may be invalid because a prior warning would have been required. A warning must be issued in advance if it is not hopeless from the outset and the warning is therefore not unwarranted. This is the case if the employee's view on the meaning of her statements may have been distorted because of the inhumane working conditions.

Thuringia Higher Labour Court, judgment of 29 June 2022 – 4 Sa 212/21

The parties are in dispute about the validity of a termination without notice, against which the employee had filed an action for unfair dismissal.

The notice of termination was issued on 29 November 2019. At that time, the employment relationship had already been terminated with notice and would have ended three months later on February 29. For operational reasons, the employer had already terminated the employment relationship on 24 November 2016. The termination was declared legally invalid by the Thuringia Higher Labour Court in April 2019. Further legal disputes arose between the parties over various payment claims.

When the employee wanted to return to work after the end of the dispute, she was assigned to do archival work in a basement infested with mould, mice, mouse droppings at a temperature of 11 °C. She was later assigned an office from where she had to walk across the yard to the archives and carry heavy files. She was observed by her colleagues when doing this.

The employee was on the telephone with a former work colleague and used insulting language about her manager and other colleagues. The managing director used the conversation as an opportunity to terminate the employee without notice. He was of the opinion that the employee had caused him economic damage in favour of a competitor and had made herself liable to prosecution for violating a trade secret. The employer did not see any evidence for the allegations.

With regard to the insults, both courts considered a warning to be necessary, as the special circumstances had to be taken into account. The working conditions for the employee did not justify her insults but were a significant imposition on her. Accordingly, the degree of what the employer has to accept increases. The consequence of working in the basement is that dissatisfaction in the working relationship is particularly high. Therefore, although it does not need to be accepted without sanctions if the limits of decency are exceeded, termination without notice is nevertheless not justified. The fact that the employment relationship would have ended in three months anyway was not decisive.

The General Equal Treatment Act applies when applying for job via the chat function

When applying for a job advertised via the Internet portal "eBay Kleinanzeigen", the interested party is considered an applicant within the meaning of Section 6 (2) of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG). The repeated inquiries of an interested party as to whether the other side is really only looking for a woman does not lead to the employer's side being able to invoke the objection of abuse of rights.

Schleswig-Holstein Higher Labour Court, judgment of 21 June 2022, 2 Sa 21/22

The parties are in dispute about a compensation payment relating to a gender discriminatory job advertisement. The defendant is a family-run small business with fewer than ten employees that maintains a repair shop and sells used vehicles. On behalf of the defendant, the brother of the managing director, who is active in the workshop sector, published an advertisement on the Internet portal eBay Kleinanzeigen. The wording of the job advertisement was " Sekretärin gesucht! Wir suchen eine Sekretärin ab sofort." [Female secretary wanted! We are looking for a female secretary with immediate effect.] The claimant, who had completed his commercial training as an industrial clerk, responded to the advertisement by asking whether "only a woman" was being sought. The application was rejected, and the applicant was told that a "lady secretary" was wanted. A telephone complaint and the assertion of a claim for compensation against the defendant were unsuccessful. In his action, the claimant sought compensation in the amount of EUR 7,800, as there was a violation of the prohibition of discrimination.

The claimant was unsuccessful at first instance. The Labour Court was of the opinion that the claimant did not fall within the personal scope of application of the AGG, since the claimant was not an applicant within the meaning of the law. However, the Schleswig-Holstein Higher Labour Court ruled in his favour. He was entitled to compensation for gender discrimination under Section 15 AGG. Accordingly, the employer is obliged to pay compensation for the damage caused in the event of a violation of the prohibition of discrimination. Not only is the defendant an employer within the meaning of the Section 6 (2) AGG, but the claimant is also an "applicant" within the meaning of Section 6 (2) AGG The status as an applicant has to be formally determined according to whether a letter of application had been received and had reached the employer. By using the reply function on the eBay Kleinanzeigen platform and expressly applying for the job, the claimant met the requirements. Complete application documents are not necessary.

By stating that the defendant only wanted to hire a woman as a secretary, the defendant discriminated against the claimant with regard to the discrimination criterion "gender" within the meaning of Section 1 AGG. The Court considered compensation in the amount of three months' salary to be appropriate. It based the salary on the current vacancies in the Hamburg area. A full-time secretary would receive a gross monthly salary of approximately EUR 2,700. The court ordered the defendant to pay EUR 7,800.

The defendant also claimed that the application was an abuse of rights because the claimant had asked whether the position was actually advertised for women only. However, the judges pointed out that high requirements had to be placed on abusiveness and that the employer had not sufficiently proven this.

■ INTERNATIONAL NEWSFLASH FROM UNYER

“Forfait jours“ – an alternative to the 35-hour week in France

Although the 35-hour week has applied in principle in France since the second Aubry Act, the legislature has also provided more flexible options for structuring working time. One of these options is the “forfait jours” arrangement, a fixed number of working days per year. Under certain conditions, working time is no longer calculated on the basis of hours but on the basis of working days.

In this regard, the “Code du travail” sets a maximum number of 218 working days, which, against the background of the 35-hour week, avoids the payment of overtime and overtime bonuses as well as the maximum daily and weekly working time being applied. This regulation mainly affects executive employees who can organise their working hours independently and are not forced to adhere to collectively agreed working time as well as employees, such as field workers, whose working time cannot be fixed in advance and who have real autonomy in organising their working time.

As a result, daily working time of 10 to 12 hours is possible, provided that the number of leave days is increased. Within the framework of this fixed number of working days, the employee is completely free to organise his working time, provided that he respects the legal provisions on daily and weekly rest periods.

In order to effectively apply the special fixed number of working days rule, two conditions must be met. First of all, the possibility of applying the fixed number of working days must be provided for in the relevant national collective or company agreements. In addition, the fixed number of working days must have been expressly contractually agreed between the parties.

It should be noted that the clause setting out the fixed number of working days may be deemed to be invalid if the employer does not take measures to preserve the employee’s health (control of working days and workload, etc.).

Despite the additional leave days as well as other measures used to check the health of employees, the fixed number of working days is an alternative that is widely used in practice to adjust the working time of executive employees.

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■ CURRENT DEVELOPMENTS IN THE AREA OF COMPANY PENSION SCHEMES

Post-merger integration – harmonisation of company pension schemes

Once a corporate transaction or restructuring has been successfully completed, in most cases the focus for the acquirer is initially on issues other than the company pension scheme (*betriebliche Altersversorgung*, bAV). However, the following reasons suggest that attention should nevertheless be paid to the company pension plan after the transaction:

On the one hand, framework conditions that cannot be continued may make it necessary to adjust the pension arrangements that have been assumed.

Examples:

- The pension arrangements assumed as part of the transaction link the contributions and/or benefits to key economic figures of the seller and previous employer.
- The pension provider previously used cannot be used by the acquirer and new employer, e.g., because the pension provider was a group institution of the seller and previous employer.

On the other hand, assumed pension arrangements increase the complexity and thereby the risks and administrative expenses:

- This may result from the fact that these “new” pension arrangements are subject to a different benefit plan or different implementation path or are implemented via a different pension provider.
- The level of provision may also differ from the arrangements at the acquirer. This results in an increase in administrative costs, the risk of unequal treatment of employees and the emergence of a “two-tier workforce” in pension matters, which must be avoided in terms of personnel policy.

It is therefore advisable to examine whether there is a need to adjust the pension plans and, if necessary, to work towards harmonising the pension landscape. For the acquirer, this saves administrative effort and costs and avoids undesirable side effects in terms of personnel policy. In addition, there is the possibility – should further company acquisitions be imminent – of restructuring the company pension plan in such a way that pension obligations to be assumed in the future can also be integrated more easily. When making the necessary adjustments to the acquirer’s existing pension plan, certain – as defined in particular by the case law of the Federal Labour Court – employment legislation must be taken into account.

Luther’s Pensions/Company Pension Schemes team will be happy to advise you on the legal framework conditions or on the harmonisation of company pension schemes in the context of a post-merger integration (PMI).

Information on the range of advisory services and the Pensions/Company Pension Schemes team can be found here.

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Company pension schemes – news flash

ESG and company pension schemes – the employer decides.

Since 2 August 2022, intermediaries have been required under the Insurance Distribution Directive (IDD) to inquire about the sustainability preferences of potential customers for insurance-based investment products (third pillar of the pension provision) as part of the advisory process. The intermediary must explain the sustainability features ("ESG", environmental- social- governance) to the customer in a comprehensible manner and gear possible product recommendations to the customer's wishes.

For company pension scheme products (second pillar of the pension provision), the previous advisory obligations under the Insurance Contract Act (*Versicherungsvertragsgesetz*, VVG) remain in place. The sustainability preference inquiry is optional for insurers and intermediaries. If "green" advice is given, the decision on the sustainability preference rests solely with the employer as the party who in principle also selects the implementation method and the provider of the company pension (e.g., direct insurance and pension fund (*Pensionskasse* and *Pensionsfonds*); Federal Labour Court, 29 July 2003 - 3 ABR 34/02, *Neue Zeitschrift für Arbeitsrecht* (NZA) 2004, page 1344).

Pension adjustment and inflation – how is the adjustment made?

Every three years, the employer must carry out a review to determine the adjustment to the current benefits of the company pension scheme and decide on this at its reasonable discretion. Under Section 16 (2) of the Company Pensions Act (*Gesetz zur Verbesserung der betrieblichen Altersvorsorge*, BetrAVG), this adjustment review obligation is deemed to have been met if the adjustment is not less than the increase in the consumer price index (CPI) for Germany or the net wages of comparable groups of employees in the company.

Because of the current high inflation rates, it may make sense to examine which type of adjustment entails lower costs for the employer. Information regarding this can be obtained from a comparative analysis of the pension adjustment based on the change in the CPI (Section 16 (2) no. 1 BetrAVG) and the trend in the net wages of comparable groups of employees (Section 16 (2) no. 2 BetrAVG). If the net wage adjustment is less than the increase in the CPI and the employer has not undertaken to adjust the pension in line with the CPI, the employer may, in the spirit of equitable discretion, make a pension adjustment based on net wages. In contrast to determining the CPI, which is published by the Federal Statistical Office, determining the trend in net wages involves a great deal of effort and, in some cases, also involves legal risks, since, for example, the attributes to be used in establishing comparison groups must be defined by the employer.

Pension fund reinsurance now also possible on a unit-linked basis for tax purposes

The insurance policies that pension funds usually use to reinsure pension benefits to be granted by a life insurance company are more "traditional" guarantee products. Triggered by the low-interest phase, a rethink was and is necessary in order to take advantage of opportunities on the capital markets. The use of new insurance products without guarantees currently seems to be the method of choice. However, reinsured pension funds are subject to the strict tax regulations of Section 4d of the Income Tax Act *(Einkommensteuergesetz,* EStG) and Section 5 of the Corporate Tax Act (*Körperschaftssteuergesetz*, KStG). For a long time, it was not clear whether reinsurance policies without a 100% guarantee of the agreed pension benefits met the standardised tax requirements. In a letter dated 31 August 2022 (IV C 6 - S 2144-c/19/10002:004), the Federal Ministry of Finance (BMF) commented on the question of the admissibility of unit-linked reinsurance policies to secure pension fund obligations under Section 4d EStG.

According to the BMF letter, unit-linked reinsurance policies are recognised as insurance policies within the meaning of

Section 4d (1) sentence 1 no. 1 c) sentence 1 EStG under the following conditions:

- guaranteed minimum benefit;
- defined contribution plan pursuant to Section 1 (2) no. 1 BetrAVG;
- matching reinsurance.

If these conditions are met, the contributions made by the sponsoring company to a reinsured pension fund are therefore deductible as business expenses and there is no overfunding. From a tax perspective, the BMF did not provide any information on the amount of the required guaranteed benefit, so that, in principle, a sponsoring company should not have to fear any restrictions when selecting the insurance product used for reinsurance. However, from an employment law perspective, the guaranteed benefit should not fall below a certain minimum level.

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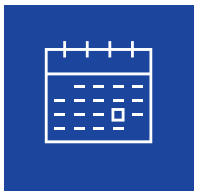
Events, publications and blog



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You will find our blog here.

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