Employment Law Newsletter

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unyer GLOBAL ADVISORS

Content

Dear readers,

The summer is behind us. Everyone is back from their holidays. It's the time of year when strategies are developed and new projects are initiated. We have also used this time to prepare practical labour-law topics for you. In this issue of our newsletter, we are therefore once again looking at current developments in the world of work.

In the last issue, we looked at the digitalisation of work processes and the associated co-determination rights of works councils as well as the risks of hacker attacks on companies. In the context of rapidly advancing digitalisation and strong competition, the issue of protecting secrets in the employment relationship is becoming increasingly important for companies. In their article, Klaus Thönißen and Christian Kuß therefore deal with issues relating to the protection of business secrets and the contractual options available to employers. They also shed light on the resulting data protection issues.

A completely different topic is the further strengthening of company pension schemes planned by the current German government. A topic that is also becoming increasingly important for companies in times of a shortage of skilled labour in order to assert themselves on the market as an attractive employer. The German government is planning a second law to strengthen company pension schemes and amend other laws. Marco Arteaga and Simon Alscher provide an initial overview of the current draft bill. The topic is highly relevant, as the legislative process is announced to start in September.

Of course, we are also presenting our international newsflash from unyer again in this issue. This time we look at Austria. Anna Mertinz from the law firm KWR in Vienna reports on teleworking. During the COVID-19 pandemic, Austrian lawmakers introduced working from home into Austrian labour law. As of 1 January 2025, the term 'home office' will be replaced by 'teleworking' by the Austrian legislator. Anna Mertinz provides an overview of the legal framework.

As usual, in this newsletter we will also be looking at the most relevant court decisions from recent weeks and months in our case law overview. Please let us know which topics and trends in the world of work are of particular interest to you in practice. We would be delighted to take these up in one of our next issues and examine them in more detail. Please also feel free to contact us directly if you have any suggestions or questions.

We hope you enjoy reading this issue!

Yours

Achim Braner

Protection of business secrets and employment contract

Business expertise of a commercial and operational nature is a key competitive factor. Especially in highly competitive industries, innovative ideas need to be protected because they secure the company's position in the market. However, employees often pose an unwanted risk of internal information leaking out through them.

I. The German Business Secrets Protection Act (Geschäftsgeheimnisgesetz - GeschGehG)

Probably the most important legal regulation on business secrets is the German Business Secrets Protection Act (GeschGehG). The obligations standardised in there are not of an employment law nature and also apply outside of employment relationships. In the event of breaches, it offers civil and criminal law consequences in the event of a betrayal of secrets, such as claims for information, injunctive relief and liability, including against third parties who received the information from the former employee.

1. Definition

According to Sec. 2 No. 1 GeschGehG, a business secret is information that is neither generally known nor readily accessible and is therefore of economic value, is adequately protected and for which there is a legitimate interest in confidentiality.

2. Appropriate confidentiality measures

In order to fulfil the requirements of the GeschGehG, an employer must take "confidentiality measures appropriate to the circumstances". If the company or its business secrets are not covered by the GeschGehG due to a lack of appropriate confidentiality measures, the options for responding in the event of a crisis are severely limited. This is because the consequences of the employment contract in relation to the employee alone are often not sufficient to achieve comprehensive protection or options for action. Such confidentiality measures can be technical, organisational and legal measures. Legal measures include, in particular, effective confidentiality clauses in employment contracts.

a) Catch-all clauses

So-called Catch-all clauses comprehensively declare all business secrets and other knowledge and processes acquired, including the employee's experience, to be confidential, even beyond the termination of the employment

relationship. They are therefore characterised by the fact that they are not restricted in terms of content or time. As they do not adequately take into account the legitimate interests of the employee due to their scope in terms of content and time, catch-all clauses are invalid pursuant to Sec. 138 (1) German Civil Code (Bürgerliches Gesetzbuch - BGB). On the other hand, such clauses are also invalid pursuant to Sec. 310, 307 (1) sentences 1 and 2 BGB, as they constitute an unreasonable disadvantage to the employee.

b) Consequences

The reasons for the invalidity of such a clause therefore do not arise from the GeschGehG itself, but rather from the general grounds for invalidity under civil law (Sec. 138, 305 et seq. BGB). The case law on the ineffectiveness of catch-all clauses provides guidance on the content of an effective confidentiality clause: The duty to transparency requires that the information to be protected under the GeschGehG be described as specifically as possible and clearly recognisable for the employee. This can be achieved, for example, by cataloguing the information according to different types and levels of secrecy and creating corresponding categories. This can include different types of information depending on the employee's area of responsibility. It is also possible to conclude post-contractual supplementary agreements on information that is to be subject to confidentiality protection but was not foreseeable at the time the contract was concluded.

II. General duty of consideration under the employment contract

According to established case law (see, for example, Federal German Labour Court - Bundesarbeitsgericht (BAG), decision of 24 March 2010 - 10 AZR 66/09), an employment contract clause is not absolutely necessary to establish a general duty of confidentiality, as the duty of confidentiality is already an ancillary duty for the employee under Sec. 241 (2) BGB, which applies even without a corresponding contractual provision.

1. Scope of protection

According to Sec. 241 (2) BGB, each party is obliged to respect the rights, legal interests and interests of the contractual partner. The specific secondary duty of confidentiality under the employment contract relates comprehensively to "trade and business secrets". The scope of protection is therefore no broader than that of the GeschGehG.

2. Legal consequences of the employment contract

If an employee breaches the duty of confidentiality arising from Sec. 241 (2) BGB during the term of the employment relationship, this may give rise to a claim for damages on the part of the employer (BAG, decision of 24 September 2009 - 8 AZR 444/08) or, if the breach is significant, may also constitute grounds for extraordinary termination (BAG, decision of 12 May 2010 - 2 AZR 845/08). Furthermore, ordinary termination is the usual and generally sufficient reaction to a breach of the secondary obligation under Sec. 241 (2) BGB. Whether a criminal offence has also been committed (Sec. 23 GeschGehG) has so far been left open by the BAG, so that the GeschGehG on the one hand and Sec. 241 (2) BGB on the other are two different connecting factors with regard to the legal consequences.

3. Requirement of a confidentiality clause

As the duty of confidentiality under an employment contract is inherent in every employment contract as a secondary obligation, an explicit provision on the duty of confidentiality in the employment contract with regard to existing confidentiality obligations is merely declaratory in nature. However, such a clause serves as a clear orientation and reminder to the employee as to which specific obligations he must fulfil. In addition, it enables the employer to precisely document its interest in keeping certain information confidential. Finally, a legally effective confidentiality clause constitutes an appropriate confidentiality measure within the meaning of the GeschGehG, meaning that its provisions apply.

III. Data protection

If the relevant trade secret is information that also contains personal data, the General Data Protection Directive GDPR comes into play. However, the two laws provide for different legal consequences or addressees in the event of an infringement - the GDPR for the "controller" (Sec. 4 No. 7 GDPR), the GeschGehG for the "infringer" (Sec. 2 No. 3 GeschGehG). As the GDPR is based on the "controller", this regulation may mean that there is no room for the liability of the individual employee, as the employer is usually the controller of the data processing - even in connection with business secrets if the employee has committed an infringement.

The German Data Protection Conference (Datenschutzkonferenz - DSK) has recognised that in the event of so-called “employee excess”, the employer is not liable under the GDPR. The employee would then be outside the scope of his or her contractual duties and pursuing his or her own purposes, so that an attribution of his or her actions to the employer is no longer justified. The BAG has not yet issued an assessment in this direction. However, the possibility of internal recourse by the employer in the internal relationship with the employee arises from general tort law, as compliance with data protection regulations is also a duty of care within the scope of the employment contract. If the employer is therefore liable under the GDPR, it can seek recourse from the employee. The scope of this right of recourse is determined in accordance with the principles of internal compensation under labour law.

IV. Post-contractual obligations

During the term of the employment relationship, a non-competition clause applies in accordance with Sec. 60 German Trade Code (Handelsgesetzbuch - HGB. In order for this to also apply post-contractually, an explicit agreement is required in accordance with Sec. 74 et seq. HGB, whereby strict requirements are placed on a corresponding regulation. In particular, pursuant to Sec. 74 (2) HGB, the post-contractual non-competition clause is accompanied by an obligation to pay compensation. Furthermore, it can only be effectively agreed for a maximum of two years. According to the BAG (decision of 15 June 1993 - 9 AZR 558/91), the duty of confidentiality under the employment contract only continues to apply in certain cases even after termination of the employment relationship. Although an employee’s fiduciary duty may continue to apply, this only applies in relation to individual breaches of fiduciary duty by the former employee, as a post-contractual duty of confidentiality must not unreasonably restrict the employee in the exercise of their profession. This is particularly the case if the duty of confidentiality is de facto equivalent to a non-competition clause (BAG, decision of 19 May 1998 - 9 AZR 394/97). In this case, the mere duty of confidentiality is misappropriated and the restrictions of Sec. 74 et seq. HGB on the post-contractual non-competition clause would be thwarted.

V. Conclusion

The GeschGehG provides employers with sufficient options to react in the event of a breach of the duty of confidentiality for business secrets. Non-disclosure clauses are therefore an essential component of the company’s security concept. In order for them to be effective, it is important to ensure that they are as transparent as possible and do not unreasonably penalise the employee in terms of content or time. In addition, an orderly exit process for the departure of employees should be regulated. Documenting which documents were handed over to the employee during the course of the employment relationship can counteract the disclosure of business secrets.

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Further improvement of company pensions through the “Company Pension Strengthening Act II”

The German government is planning a second law to strengthen company pension schemes and to amend other laws (“Company Pension Strengthening Act II”). In the meantime, the draft of the bill was published and the government coalition has announced that it will initiate the legislative process in September.

I. Background

At the end of 2021, around 18.4 million employees subject to social insurance contributions had an active occupational pension entitlement with their current employer. In order for the situation to improve significantly, company pension schemes must be further expanded and strengthened in terms of quantity and quality as a sensible supplement to statutory pension insurance. This applies in particular to areas in which there are still large gaps in coverage, i.e. in smaller companies and among employees with low incomes. In the 2021 coalition agreement, the governing parties defined the goal with regard to company pension schemes as follows:

“We want to strengthen company pension schemes, among other things by authorising investment opportunities with higher returns. In addition, the social partner model launched in the penultimate legislative period with the Company Pension Strengthening Act must now be implemented.”

The draft of the bill must be measured against this objective in particular. In consequence, the following questions arise: Will the company pension scheme actually be strengthened by this reform measure? And are the right incentives being set and false incentives being removed? Some experts have criticised the draft. Although the Federal Government recognises the socio-political need to strengthen company pension schemes, the draft of the bill is still in need of discussion. Experts see a need for action that goes beyond the draft.

II. Contents

The Company Pension Strengthening Act II is intended to further develop the legal framework for company pension schemes, which remain voluntary in principle, in a targeted

manner. Obstacles that have become apparent in recent years are to be removed and new incentives created so that good company pensions can become a matter of course in as many companies as possible and an integral part of employees' retirement provision. In the draft of the bill, the German government has set the following priorities in labour, financial supervisory and tax law. In labour law, the social partner model, which was introduced in 2018 and is based on collective agreements, will be further developed. Sec. 24 of the draft (Betriebsrentengesetz-Entwurf - BetrAVG-E) outlines ways in which third parties not bound by collective agreements, and therefore often smaller companies and their employees, can also participate in social partner models. Labour law is to be modified in certain areas in order to achieve the greatest possible dissemination effect. For example, the Act is intended to facilitate the possibility of introducing the automatic inclusion of all employees in deferred compensation schemes at company level (so-called "opting-out systems").

New impetus is also to be provided in the German Financial Supervisory Act (Versicherungsaufsichtsgesetz - VAG, Investment Ordinance) in order to increase the attractiveness of company pension schemes. Against the backdrop of the new supplementary earnings law in the statutory pension insurance scheme, pension funds are to be authorised to agree higher payments in the event of early withdrawal of benefits. With the aim of achieving higher returns and thus higher company pensions for pension funds, the investment regulations are to be expanded and the cover requirements made more flexible. For social partner models, the possibilities for buffer formation are to be improved so that room for manoeuvre is opened up for more offensive investment strategies without payouts being subject to greater fluctuations.

In tax law, the promotion of company pensions for employees with lower incomes is to be improved via the subsidised amount for company pension schemes in accordance with Sec. 100 German Income Tax Code (Einkommenssteuergesetz – EstG). Furthermore, the advancing digitalisation of insurance companies and the Pension-Security-Association (Pensions-Sicherungs-Verein) in particular is to be taken into account and less bureaucracy is to be required for all parties involved. In future, the Pensions-Sicherungs-Verein should, for example, be able to issue contribution notices automatically without processing and communicate digitally with beneficiaries in a legally secure manner. Two points ultimately stand out: the planned changes to the social partner model and the improvements to the low-income subsidy.

II. Social partner models

Experts welcome the fact that Sec. 24 BetrAVG-E outlines ways in which third parties not bound by collective agreements can also participate in social partner models. In addition, the law should clarify that inadequate or insufficient involvement of the social partners does not invalidate the pure defined contribution commitment. However, there is still a need for regulation in various areas. For example, the new obligation to obtain the consent of each individual employee not covered by a collective agreement should be viewed critically, as this is not practicable and creates legal uncertainty. It is also worth mentioning that access to a social partner model is practically ruled out for non-tariff employees and executives, as they are not covered by the areas of application of the collective agreements unless the collective agreement is expressly opened up to them. It should at least be critically scrutinised whether a regulation should be created that also permits the inclusion of this group of people.

The regulations on the possibility of switching between social partner models or pension providers and the planned regulations on severance payments within the framework of social partner models are perceived positively, although further clarification is also required here. It must be clarified how to deal with competition between social partner models if several of them are relevant. This can become important if different trade unions are responsible for the employment relationships or if different trade unions are responsible for individual parts of the company or group. The collective bargaining proviso only blocks social partner models in other sectors.

III. Improvements to the low-income subsidy

The low-income subsidy under Sec. 100 EStG has been a success story since its introduction in 2018. Figures from the Federal Statistical Office show that in the first three years after the introduction of the new subsidy alone, more than 82,000 companies utilised it for over one million employees. Against this background, the increase in the subsidy amount and the resulting increase in tax-incentivised contributions as well as the linking of the income limits for those entitled to the subsidy to the contribution assessment ceiling (3 % of the contribution assessment ceiling) and the slight increase in the

income limit compared to the current level have been positively received by experts. The level of the subsidy rate incentivises employers to make such additional company pension commitments. Against this background, there are suggestions from experts that the subsidy rate should be increased from 30 % to 40 % or even 50 %, which should lead to a significant increase in company pension schemes for low earners.

IV. Conclusion

It remains to be seen whether the situation with regard to company pension schemes will improve significantly for smaller companies and employees with low incomes as a result of the Company Pension Strengthening Act II. Nevertheless, it should be noted that the strengthening of company pension schemes is necessary in terms of social policy and is being constantly pursued by legislators.

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Data protection violations by employees do not exempt the employer from liability

Exemption from liability in the event of data protection breaches pursuant to Sec. 82 (3) GDPR for the data controller does not apply simply because the breach was caused by a person subordinate to the data controller.

ECJ, decision of 11.4.2024 - C-741/21 (juris)

The case

The main proceedings originate from Germany. The plaintiff is a lawyer and was a customer of the legal database “juris”. At the end of 2018, he revoked all his consents to receive information, with the exception of the sending of newsletters, and objected to any processing of his data. Subsequently, he continued to receive advertising letters, which did not stop even when he pointed out his objection, renewed it and demanded compensation for the unlawful processing of his data. Each of the letters contained a “personal test code” which, when entered on the juris website, displayed an order screen with the plaintiff’s pre-entered data. He then filed a claim for material and immaterial damages. On the other hand, juris rejected any liability on the grounds that the late consideration of the objections was either due to an employee error or because it would have been too costly to process the objections. The Saarbrücken Regional Court hearing the case (decision of 22 November 2021 - 5 O 151/19) then referred several questions to the ECJ regarding the claim for damages under Sec. 82 GDPR, including whether the exemption from liability under Sec. 82 (3) GDPR applies to an employer if an employee has committed the data protection breach.

The decision

The ECJ initially confirmed that a mere breach of the GDPR is not sufficient to justify a claim for damages. The existence of material or non-material damage is one of the requirements,

as is a breach of the regulation and a causal link between this and the damage. In this respect, the infringement itself does not automatically give rise to a claim, although the loss of control over one's own personal data can nevertheless constitute non-material damage.

The Court then moved on to the question of liability. According to Sec. 82 (3) GDPR, a data controller (e. g. an employer) is exempt from liability if it proves that it is not responsible in any way for the circumstances that caused the damage. Sec. 29 GDPR, in turn, states that persons subordinate to the controller (e. g. employees) who have access to personal data may only process this data on the basis of instructions from the controller and in accordance with these instructions. To this end, Sec. 32 (4) GDPR stipulates that the controller must ensure that this only takes place on the controller's instructions. It is therefore up to the controller to ensure that its instructions are carried out correctly, which is why it cannot simply exempt itself from liability by claiming negligence or misconduct on the part of a person under its authority. Exculpation can only be considered if the person responsible can prove that there is no causal link between the data protection breach and the damage. The fact that an employee acts contrary to instructions is not sufficient, as otherwise the practical effectiveness of Sec. 82 (1) GDPR would be impaired.

Our comment

The ECJ has recently ruled several times on questions of claims for damages under Sec. 82 GDPR, but only with regard to a potential exemption from liability under Sec. 82 (3) GDPR with regard to the fulfilment of technical and organisational measures to which the GDPR obliges. This decision does not mean that exculpation is always excluded in the event of employee errors, but further submissions to the ECJ are required for a more detailed determination. As a preventative measure, tasks involving data collection and processing should only be assigned to qualified employees. In addition, appropriate information and training is required on a regular basis, depending on the data protection risk profile. If there are signs of excessive demands or misconduct, tasks must be reallocated or employees reassigned. In particular, care must be taken to ensure compliance with the data protection obligations under the GDPR, that data processing only takes place on instruction and only within this framework, which must be checked regularly. Exculpation in terms of personnel can only be considered if the employer fulfils all structurally reasonable measures in this respect.

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Abolition of the obligation to pay compensation to managing directors

In managing director employment contracts, it is effective to agree on the retroactive cancellation of the obligation to pay compensation for non-compliance.

German Federal Court of Justice (Bundesgerichtshof – BGH), decision of 23 April 2024 - II ZR 99/22

The case

The employment contract of the managing director of a company that operates nursing and care facilities contained a post-contractual non-competition clause along with a compensation for non-competition in the amount of 50 % of the last monthly salary received. Furthermore, in the event that the managing director breached the non-competition clause, the agreement stipulated that the payment obligation would lapse retroactively and a repayment obligation would arise. After seven years of employment, the company declared its closing. Approximately one year later, the managing director took up employment with a company that offered consultancy services, particularly in the health and social services sector and the senior citizens' sector. After the company invoked the validity of the cancellation agreement, the managing director filed a counterclaim for payment of the compensation. The Regional Court of Berlin rejected a claim for payment, while the Berlin Court of Appeal upheld the claim, at least until the start of the subsequent activity, essentially arguing that the cancellation provision violated the prohibition of excessiveness.

The decision

However, the company was ruled in favour of the BGH: the cancellation and repayment had been effectively agreed. The court stated that the effectiveness of a non-competition clause with a managing director is only measured by whether it is necessary to "protect a contractual partner from disloyal utilisation" of the employee. The yardstick is therefore primarily Sec. 138 and 242 of the German Civil Code (Bürgerliches Gesetzbuch - BGB), which require a balancing of interests that comprehensively recognises the particular circumstances of the individual case. Measured against this standard, the agreement was fully effective. Referring to its almost forty years of case law, the BGH emphasised that not only the amount, but even the "whether" of a compensation

payment was freely negotiable with the managing director. There were therefore no fundamental reservations about applying the agreement.

The court did not accept the objection raised by the managing director that the agreement did not provide for an equivalent sanction for breaches on the part of the company: It rightly stated that it was already unclear which breach of duty could require sanctioning at all. The decisive factor was fundamental considerations regarding the legal consequences of nullity pursuant to Sec. 139 BGB: The nullity of the agreement on the cancellation with the simultaneous maintenance of the obligation to pay compensation would have the quality of a so-called reduction to preserve the validity - i. e. the reduction of an invalid provision to the (just still) permissible extent - and could therefore not be considered. The legal consequence standardised in Sec. 139 BGB is not the preservation of the provision, but its complete nullity. Therefore, if the cancellation provision is invalid, the payment obligation would also be null and void. The aim of Sec. 139 BGB is precisely to assign the risk of the invalidity of a provision to both parties. Something else could only apply if it could be positively established in court that the parties would have entered into the agreement even without the invalid provision - and there were no indications of such a situation here.

Our comment

For the contracts of managing directors, the decision in itself has favourable effects for the company: There is a prohibition against post-contractual competition, which can be secured not only by contractual penalties, but also by a retroactive cancellation of the obligation to pay compensation. However, caution is advised for employers: The regulatory regime of Sec. 74 et seq. German Trade Code (Handelsgesetzbuch – HGB) provides for a non-mandatory obligation to pay compensation for non-competition clauses with employees (Sec. 75d HGB). Employers should therefore continue to follow the wording of Sec. 74 et seq. HGB when formulating non-compete clauses.

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Formally effective employee leasing agreement to fulfil the disclosure and concretisation obligation

In order for the disclosure and concretisation obligation standardised in the Employee Lending Act (Arbeitnehmerüberlassungsgesetz – AÜG) to be fulfilled, a formally effective assignment agreement must exist between the lender and the hirer before the start of the temporary employment. If this is not the case, an employment relationship may arise between the temporary worker and the hirer.

BAG, decision of 5 March 2024 - 9 AZR 204/23

The case

The plaintiff was hired by the company A-GmbH on 4 June 2012. He then worked first for the defendant's legal predecessor, E-GmbH, and then for the defendant as a warehouse clerk. He was employed until 15 December 2018 on the basis of a contract for work and services. From 16 February 2018, the assignment took place on the basis of a temporary employment contract, which A-GmbH signed on 5 February 2018 and the defendant's legal predecessor on 28 February 2018. Within the contract, an annex signed by the parties at the same time recorded the plaintiff's assignment from 16 February 2018 to 31 December 2018. The defendant informed its works council in writing on 5 February 2018 about the deployment of the plaintiff for the period set out in the annex, which approved the deployment on 8 February 2018. On 1 January 2019, the operations of A-GmbH were transferred to W-GmbH by way of a transfer of business. The defendant continued to employ employees from W-GmbH and its legal predecessor, A-GmbH.

The plaintiff took the legal view that an employment relationship had existed between him and the defendant since 16 February 2018 due to non-compliance with the statutory disclosure and specification obligations prior to the transfer of his person. The Herne Labour Court upheld the claim, while the Hamm Higher Labour Court dismissed the defendant's appeal.

The decision

The BAG ruled that an employment relationship existed between the parties pursuant to Sec. 9 (1) No. 1a AÜG in conjunction with Sec. 10 (1) sentence 1 AÜG because the defendant had breached the duty of disclosure and concretisation standardised in Sec. 1 (1) sentences 5 and 6 AÜG. This can only be fulfilled if a formally effective employee leasing agreement exists between the lender and the hirer at the start of the employee leasing. The wording in particular speaks in favour of this. Both standards would presuppose that an effective employee leasing agreement exists at the start of the employee leasing. In order for the contract to be effective, it must satisfy the written form requirement standardised in Sec. 12 (1) sentence 1 AÜG. It cannot be assumed that the fulfilment of the obligation is based on an employee leasing agreement that does not comply with the effectiveness requirements regulated within the AÜG. Otherwise, different requirements would be imposed within one law. If the employee leasing agreement is not signed by the parties in advance, it does not fulfil the written form requirement and is void pursuant to Sec. 125 sentence 1 BGB. It cannot become effective retrospectively either. A void contract cannot be the basis for fulfilling the disclosure obligation. Although the obligation to specify the person of the temporary worker does not necessarily require a provision in the temporary employment contract, it is linked to the existence of a formally effective temporary employment contract, as is clear from the wording. A different interpretation does not result from systematic considerations either. Furthermore, a teleological reduction of Sec. 1 (1) sentences 5 and 6 AÜG cannot be considered, as there is no unintended loophole in the sense of the absence of an exception.

Our comment

The decision reflects the legislative will expressed by the amendment to the AÜG. The wording argument weighs heavily. If the lender and hirer do not disclose the temporary employment, this leads to the invalidity of the temporary employment contract between the lender and the temporary

worker. This in turn results in an employment relationship with the hirer, unless the temporary worker submits a declaration of retention. The wording of the law does not differentiate according to the extent to which the breach of the disclosure obligation has occurred. Anyone who holds a temporary employment permit as a precautionary measure should not be favoured over those who operate a temporary employment agency without a permit. Whether there was an intention to conceal or whether it was assumed on the basis of justifiable arguments that a supply of labour existed is not decisive. This must be taken into account above all because there are also cases in which the legal situation cannot be answered with legal certainty in advance. In practice, it should therefore be examined very carefully whether a form of external personnel deployment other than employee leasing is actually being considered and whether any associated risks should be taken. If the legally secure option of employee leasing is used, the necessary and formal requirements must be met.

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Requirements for company (partial) transitions and instruction letters

A transfer of business pursuant to Sec. 613a (1) BGB requires the transfer of an already existing functionally independent economic unit to the acquirer, which can also be created solely for the purpose of enabling the transfer; in this context, no unrealistic requirements may be placed on the notification letter.

BAG, decision of 21 March 2024 - 2 AZR 79/23

The case

The parties are in dispute about the plaintiff's continued employment with the defendant motor vehicle manufacturer. The latter provided engineering and testing services for the overall vehicle development in a development centre. On the basis of a contractual agreement with an interested party, the defendant created an independent sub-area for vehicle and powertrain development within this company with its own personnel management and organisation and a visual separation from the rest of the company. It transferred approximately 2,000 employees, including the plaintiff, to this sub-division. Only one month later, it sold the business unit to the purchaser. Prior to this, it informed the plaintiff of the transfer and the transfer of the business, which he objected to. He filed a lawsuit against the validity of the transfer of operations, his transfer and the notification letter, which was unsuccessful in the first two instances.

The decision

The BAG overturned the appeal decision, referring back the decision on an effective transfer of the plaintiff. However, the court confirmed that the business premises taken over by the acquirer constituted a transferable economic unit pursuant to Sec. 613a (1) sentence 1 BGB. A transfer of business pursuant to Sec. 613a (1) BGB requires the transfer of an already existing functionally independent economic unit to the

acquirer, which can also be created solely for the purpose of facilitating the transfer, as long as it is not a case of fraudulent or abusive behaviour. The transfer of employees to this (partial) unit with a view to the transfer of the business is possible.

The BAG also emphasised that no unrealistic requirements, according to which the notification letter must be free of all "legal errors", may be placed on the notification of the legal consequences of the transfer of business pursuant to Sec. 613a (5) No. 3 BGB. Only errors that are causal for the employee's decision to object can prevent the start of the objection period. It is sufficient to indicate that the purchaser of the business has entered into the rights and obligations arising from the employment relationship and the allocation of liability in accordance with Sec. 613a (2) BGB and to state the relevant facts. It is not necessary to inform the employee of any other individual consequences that may affect the employee. The employee must obtain legal advice on this.

Our comment

Fortunately, the BAG has relaxed the strict requirements originally set out in its decision of 10 November 2011 - 8 AZR 430/10, according to which the notification letter must not contain "any legal errors". Only errors that are causal for the decision to object can prevent the start of the objection period. It is true that great care is still required when preparing the notification letter and in particular when presenting the relevant facts. However, it is at least clarified that no comprehensive legal advice is owed. The decision also highlights practical options for the structuring of business transfers. A business (division) may also be created for the sole purpose of facilitating a transfer of business. It is also possible to transfer employees to this specially created business (division).

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Requirements for the burden of presentation and proof in cases of working time fraud

In accordance with the graduated burden of presentation and proof in dismissal protection proceedings, the employer must provide substantiated disputes and further incriminating circumstances if the employee presents specific exonerating circumstances. The fact that an employee clocks out later than her team colleagues does not in itself give rise to sufficient suspicion of working time fraud; this applies in particular if there is rework to be done that can also be done alone.

Higher Labour Court Lower Saxony (Landesarbeitsgericht - LAG Niedersachsen), decision of 20 February 2024 - 9 Sa 577/23

The case

The parties are in dispute about the validity of a dismissal for fraudulent behaviour during working hours. The plaintiff was employed as a paramedic by the defendant, which operates a rescue service and a vaccination centre. The paramedics are always deployed in teams of two. After the rescue missions, various follow-up work has to be carried out, sometimes in a team, sometimes alone. During a review of the time sheets, the defendant discovered anomalies: on 15 working days, the plaintiff had considerably longer working hours per shift than the corresponding team colleague. In addition, the plaintiff had a break credited to her on one day even though she had taken it. It is disputed between the parties whether the plaintiff admitted that she had this break credited to her wrongfully. The defendant initially terminated the employment relationship for cause without notice, but refrained from doing so and terminated the employment relationship with due notice after learning that the plaintiff was pregnant at the time of termination. The plaintiff argued that she had carried out the follow-up work alone, which explained the longer working hours. Moreover, the break had only been a substitute for a

break that had previously been scheduled but not taken. The Labour Court upheld her action for unfair dismissal.

The decision

This was also the decision of the LAG, which dismissed the defendant's appeal. There was a lack of sufficient grounds for termination. In principle, the plaintiff's wilful breach of the contractual obligation to document working hours correctly could justify both extraordinary and ordinary dismissal. However, the defendant had failed to fulfil its burden of presentation and proof pursuant to Sec. 1 (2) KSchG.

In the case of a dismissal on grounds of behaviour, the suspicion of a serious breach of duty is sufficient grounds for dismissal. However, the principle of the graduated burden of presentation and proof applies. According to this principle, the employer must also disprove such facts by concrete denial and, if necessary, proof, which relate to a justification asserted by the dismissed employee. Measured against these principles, the defendant was not able to sufficiently demonstrate either the suspicion of systematic working time fraud or the offence of such. The mere fact that the plaintiff had worked longer than the other team member did not constitute working time fraud, as it was undisputed that there was also rework to be carried out that could be completed alone. The defendant was unable to disprove that the work assignments presented by the plaintiff took place during the originally planned break time. The alleged confession did not change this. The plaintiff stated what work she had carried out during the period in question. Since this "confession" could not be reconstructed on the basis of the recorded working hours, no conclusion could be drawn as to working time fraud. Finally, the defendant had also failed to fulfil his burden of presentation and proof with regard to the subsequent work. The defendant's submission that there were no standard times for the follow-up work was not qualified. The same applies to the submission that other teams need less time in comparison. This was also not meaningful, as nothing had been submitted regarding the specific distribution of tasks for the follow-up work.

Our comment

The requirements regarding the burden of presentation and proof for employers in cases of suspected working time fraud are high. The employer must first comprehensively clarify the facts of the case in accordance with the graduated burden of presentation and proof. Complete documentation of all details of the case is essential. Every objection raised by the other party should be addressed in detail in the court proceedings. It is not sufficient to merely make general statements about the operational procedure without reference to the specific case. This principle also applies in the context of dismissal on suspicion and the associated hearing. In day-to-day operations, attention should also be paid to clear regulations regarding both the recording of working hours and the allocation of tasks.

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Malicious omission of other earnings - breach of social law obligations to act

If a dismissed employee violates his or her obligations under social law, e.g. to actively cooperate in avoiding or ending his or her unemployment, this may be taken into account to his or her detriment in terms of malice. The same applies if the employee's behaviour is the reason why the employment agency does not make him any job placement offers.

BAG, decision of 7 February 2024 - 5 AZR 177/23

employment agency. After a suspension period, the plaintiff received unemployment benefit I until 25 January 2019. No job application efforts were made during this time. On the contrary, the claimant stated that he did not wish to receive any job offers, would only apply under duress and would inform potential employers about the dismissal protection proceedings before an interview and signal that he wished to remain in employment. For the period from February 2019, the plaintiff submitted application efforts, which the defendant denied. The plaintiff worked from 29 July 2019 to 31 August 2019 and from 1 February 2020 to 31 July 2020. The action for protection against dismissal was successful in the second instance, whereupon the plaintiff continued to be employed from 31 August 2020. The Labour Court upheld the claim for default of acceptance pay for the period from 1 April 2019 to 30 August 2020, while the Higher Labour Court (LAG) also upheld the claim for the period from 1 January 2018 to 31 March 2019.

The decision

The BAG referred the case back to another chamber of the LAG. It had failed to carry out an overall assessment when examining the malice pursuant to Sec. 11 No. 2 KSchG and to take into account the breach of social law obligations to act. In addition to the obligation to register as a jobseeker (Sec. 38 (1) Social Insurance Code III (Sozialgesetzbuch - SGB III), this also includes the obligation to actively co-operate in the prevention or termination of unemployment (Sec. 2 (5) SGB III). It should be taken into account to the detriment of the plaintiff that his own behaviour was the cause of the failure of the employment agency to find a job. Even an unsolicited reference to ongoing dismissal protection proceedings prior to a job interview does not correspond to the behaviour of a person actually seeking a new job. Taking Sec. 162 BGB into account, the burden of presentation and proof should be graded according to the interests at stake. The defendant had

to provide sufficiently concrete evidence as to whether the plaintiff could have been offered reasonable work during the relevant period. The plaintiff then bears the burden of presentation and proof that his application would have been unsuccessful.

Our comment

The BAG's further development of the case law on the requirements for a malicious omission of other earnings is to be welcomed. The duties of the "job-seeking plaintiff" during a dismissal protection process are to register with the employment agency and to seriously follow up on placement offers made. In this case, it will be difficult to accuse him of inactivity that would constitute bad faith. This applies in particular as the BAG rejects in a subordinate clause the view sometimes held that application efforts must be made to the extent of a full-time position. However, if the claimant prevents the employment agency from being able to fulfil its placement task at all, this may constitute malice.

The employers, who were burdened with the burden of presentation and proof, were therefore shown new reasons for a malicious omission. Specific job advertisements should continue to be researched, documented and verifiably sent to the plaintiff for the period of the ongoing dismissal protection proceedings. In addition, a claim for information can be asserted against the employee with regard to the placement efforts of the employment agency and official information on job vacancies can be obtained. Prepared in this way, the burden of presentation and proof can be satisfied, so that the employee bears the burden of presentation and proof under the aspect of frustration of conditions that his application for these positions would have been unsuccessful.

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Permissible expiry of virtual option rights after the end of the employment relationship

The individual contractual provision of a successive expiry of already vested virtual option rights after termination of the employment relationship is permissible due to its primarily speculative nature and does not unreasonably disadvantage an employee.

Higher Labour Court Munich (Landesarbeitsgericht - LAG München), decision of 7 February 2024 - 5 Sa 98/23

The case

The plaintiff employee had been employed by the defendant employer since 1 April 2018. At the end of August 2019, he received an allocation letter granting him virtual option rights. He was explicitly not to provide any consideration in return; rather, the options were intended solely as an incentive to contribute to the future success of the company. For this reason, they were only to be exercised gradually.

The specific conditions for the options were set out in the "Employee Stock Option Provisions", which were attached to the allocation letter. These stipulated, among other things, that the vesting period would run for four years from the grant date. The first 25% of the allocated options were to become exercisable after twelve months, the remainder successively thereafter. Options that are not exercised should lapse if the employment or service relationship of the beneficiary ends before an exercise event, regardless of the reason for the termination. In this context, a gradual expiry of the exercisable options was also regulated: 12.5 % of the options were to expire every three months after the end of the employment relationship, i.e. all exercisable options after two years.

The plaintiff's employment relationship ended on 31 August 2020 as a result of his own resignation; at this time, 31.25 % of his option rights were exercisable. He asserted his option claims for the first time in a letter dated 2 June 2022. In his opinion, these were not forfeited due to his termination; the forfeiture provision violated the principle that remuneration that has already been earned may not be withdrawn. The Munich Labour Court dismissed his subsequent claim.

The decision

The Higher Labour Court Munich also dismissed the plaintiff's appeal. These asserted option rights had expired due to the provisions in the "Employee Stock Option Provisions". According to these provisions, exercisable options should expire within two years of termination of the employment relationship. The provision did not violate the transparency requirement of Sec. 307 (1) sentence 2 BGB, as the expiry over two years was clearly regulated. Furthermore, there is also no unreasonable disadvantage pursuant to Sec. 307 (2) no. 1 BGB. The provision does not lead to the cancellation of a synallagmatic remuneration. It is true that virtual options are in themselves a component of the remuneration under the employment contract; despite their speculative nature compared to other special remuneration, share options also have the character of remuneration in themselves, which is not altered by the fact that the plaintiff did not have to provide any consideration. In this respect, virtual options could also be understood as a form of employee participation. However, unlike special remuneration, both share and virtual options have a much more speculative character. They are therefore less a consideration for work than a chance of profit and an incentive for future commitment. Clauses that require the existence of an employment relationship for the exercise of share options after expiry of the waiting period are therefore permissible and not unreasonably disadvantageous. No earned wages are withdrawn, only an opportunity to earn money. These principles would also apply to virtual options. The appeal was authorised.

Changes to the criteria for a special benefit are subject to co-determination

If the employer grants a new special benefit or changes the conditions of an established bonus, it influences the distribution of the total remuneration and the determination of the relationship between the remuneration components, which is why the works council has a mandatory right of co-determination under Sec. 87 (1) No. 10 Works Council Constitution Act (Betriebsverfassungsgesetz - BetrVG).

BAG, decision of 21 February 2024 - 10 AZR 345/22

The case

The three plaintiffs in the proceedings joined in the appeal are employed by the defendant employer, which erects and maintains wind turbines. Since the mid-1990s, its legal predecessor has paid its employees an annual holiday allowance. For the first time in mid-2008 up to and including 2013, the legal predecessor of the defendant sent a letter regarding the holiday allowance in which it stated, among other things, that the holiday allowance would be granted to "all employees who are in a permanent employment relationship without notice of termination on the reference date of 1 June". The letter also contained regulations on the maximum amount of the holiday allowance, which was to be decided anew each year and was also to be based on length of service. It also contained a provision stating that the holiday allowance is "a one-off, voluntary social benefit that can be revoked at any time".

In June 2014, the legal predecessor of the defendant sent a different letter to its employees, which addressed a Christmas bonus in addition to a holiday allowance and made changes to the eligibility requirements, such as the cut-off date regulation. The works council existing at the defendant's legal predecessor was not involved. In mid-2020, the employees were then informed that the payment of holiday pay for the current year would be suspended. Immediately afterwards, the plaintiffs claimed payment of holiday pay for 2020 in accordance with their length of service. The Labour Court upheld their subsequent claims, while the Higher Labour Court dismissed them following the defendant's appeals.

The decision

The BAG again upheld the plaintiffs' appeals. They were entitled to holiday pay for 2020 under the overall commitment made by the defendant's legal predecessor in 2008, in which the defendant had undertaken to pay holiday pay that it was to determine annually at its reasonable discretion. Various formulations would speak in favour of the creation of an entitlement, for example that the holiday allowance is "granted". The provision stating that this was to be a voluntary social benefit that could be revoked at any time did not contradict this, as the combination of the voluntary nature and revocation proviso was not transparent and therefore constituted an unreasonable disadvantage within the meaning of Sec. 307 (1) sentence 1 BGB, which led to the clause being invalid.

With the deviating letters from 2014, the legal predecessor of the defendant was not able to effectively modify the claim to the detriment of the beneficiaries due to the lack of involvement of the works council. Pursuant to Sec. 87 (1) no. 10 BetrVG, the works council must have a say in matters of

company pay organisation, in particular in the establishment and amendment of remuneration principles. In continuation of the theory of the effectiveness requirement, employees could demand remuneration on the basis of the last remuneration principles introduced in accordance with co-determination in the event of a breach of the co-determination right. The remuneration principles introduced at the defendant's legal predecessor within the meaning of Sec. 87 (1) No. 10 BetrVG also include the holiday pay paid under the overall commitment of 2008. As a Christmas bonus - i.e. a new remuneration component - was introduced from 2014 and the conditions and grounds for exclusion for holiday pay were adjusted, the existing remuneration principles were changed, which triggered the works council's right of co-determination. However, the works council was not involved, which is why the plaintiffs could continue to rely on the previous regulations. Furthermore, the setting of the holiday pay to "zero" in 2020 did not correspond to equitable discretion pursuant to Sec. 315 (1) BGB and was therefore not binding, as the defendant had referred to the challenges posed by the Covid-19-pandemic, but had not provided sufficiently substantiated information on its economic situation.

No conversion of an employment relationship into a service relationship in the event of a merger

If an employee is appointed as managing director while maintaining his employment relationship with another group company, a subsequent merger of his contractual employer with this other company does not lead to the transformation of his employment relationship into a service relationship.

Higher Labour Court (Landesarbeitsgericht - LAG) *Düsseldorf,* **decision of 7 December 2023 - 3 Ta 273/23**

The case

The plaintiff had been employed by U-GmbH as a product manager since the end of 2015 on the basis of an employment contract. In 2017, he was appointed managing director of the group company V-GmbH, the defendant in these proceedings. No further agreements were concluded; subsequent amendments to the contract with regard to the managing director position merely emphasised that "all other terms and conditions of the employment relationship remain unchanged". In mid-2020, the plaintiff was informed that U-GmbH would be merged into V-GmbH and that his employment relationship would be transferred to V-GmbH by way of a transfer of business. After the merger, the defendant irrevocably released the plaintiff in autumn 2020. Shortly before Christmas 2020, his dismissal as managing director was entered in the commercial register and he no longer worked for the defendant.

With his claim filed in March 2023, the plaintiff asserted claims for holiday pay in the gross amount of EUR 33,884.61. In his opinion, legal recourse to the labour courts is open. The Wuppertal Labour Court rejected the claim as inadmissible and referred the legal dispute to the ordinary courts. The Labour Court did not uphold the plaintiff's immediate appeal, but referred it to the Higher Labour Court.

The decision

The court initially confirmed the jurisdiction of the labour courts, as there was a dispute between the employer and employee arising from the employment relationship. The fictitious effect of Sec. 5 (1) sentence 3 Labour Court Act (Arbeitsgerichtsgesetz - ArbGG), according to which persons who are appointed to represent the legal entity are not deemed to be employees, did not prevent recourse to the labour courts here because it had already ended with the dismissal of the plaintiff as managing director of the defendant at the end of 2020. The provision has therefore no longer blocked the jurisdiction of the labour courts since then. However, the elimination of the fiction does not automatically lead to the jurisdiction of the labour courts if the plaintiff only claims to have (been) employed in an employment relationship. The legal nature of the employment relationship of a representative of a corporate body does not change solely as a result of the dismissal of the representative, but at the same time a previous employment relationship of the managing director does not become an employment relationship. The plaintiff had acted solely on the basis of an employment contract agreement, also as managing director of the defendant; all other agreements had also always referred to this employment contract.

The entry of the defendant into the plaintiff's employment relationship did not result in anything else. This process did not transform the employment relationship into a (free) managing director's employment relationship, nor did the fact that the contractual and executive relationship now coincided. There is neither a contractual nor a legal basis for a contrary assumption. The relationship between the executive body and the employment relationship are fundamentally independent of each other. Although a GmbH managing

director regularly works on the basis of an employment contract, it is not ruled out that the activity can also take place within the framework of an employment relationship on the basis of the contractual agreement. If, in turn, an employment relationship is explicitly agreed, it should also regularly be categorised as such. There is no reason for a status correction taking into account the actual execution of the contract with regard to the special protection rules for employment relationships; Sec. 611a (1) sentence 6 BGB does not provide for this either. Nothing else follows from the merger either. As a result of this, the defendant had entered into the plaintiff's employment relationship in accordance with Sec. 324 Company Transformation Act (Umwandlungsgesetz – UmwG) old version, Sec. 613a BGB. The establishment of such an employment relationship as a contractual basis for the managing director's activity is also possible without further ado if the employment takes place directly with the company of which the managing director is to be the representative of the executive body. Even in the event of a transfer of business to this company, the employment relationship does not become an employment relationship.

Obligation to provide emergency care during a strike

In the context of industrial action, emergency work may also be necessary at a transport company if it is responsible for the transport of school-age children; alternatively, sufficient notice must be given of the next strike action.

Higher Labour Court (Landesarbeitsgericht - LAG) Saxony, decision of 10 June 2024 - 4 GLa 10/24

The case

The parties are in dispute by way of interim relief regarding the introduction of an emergency supply for the transport of pupils during ongoing strike action. The plaintiff in the injunction is a transport service provider in local public transport, the defendant in the injunction is a trade union. Since the end of 2023, the parties have been negotiating the conclusion of a new collective agreement on working hours. Since then, the defendant has called strikes several times, most recently with increasing frequency and at short notice in the form of wave strikes. When the defendant immediately called the next work stoppage in mid-May 2024 after the tenth strike in total, which also affected a regular school day, the plaintiff submitted a draft emergency agreement to the defendant in order to enable a basic supply of transport for pupils in the event of future strikes. The defendant rejected this draft and subsequently called two further strikes, in both cases with only a few hours' notice. On 23 May 2024, the plaintiff applied for interim relief to oblige the defendant to cooperate in an emergency supply and to issue a basic emergency service plan for the interim period. Because it transports around 1,800 pupils every day, it urgently needed such a plan or at least longer notice periods for strike action so that parents and pupils could organise alternative transport options. The Labour Court largely granted the applications.

The decision

This was also the decision of the LAG Saxony, which dismissed the defendant's appeal. The defendant was obliged to participate in emergency service planning; until then, an emergency service plan providing for basic care during school days applied. However, the defendant could avoid its application by announcing a strike at least four calendar days in advance. The resulting prohibition of very short-term industrial action enables pupils and guardians to take the necessary precautions to enable alternative and safe transport. The freedom of association guaranteed in Sec. 9 (3) of the German Constitution (Grundgesetz - GG), which also includes the right to strike, is guaranteed without a legal proviso, but is nevertheless subject to restrictions for the protection of legal interests and public welfare interests if these are equally important under constitutional law. A strict standard must be applied here, as judicial measures shift the balance of power - even if an emergency service is ordered. As the parties had not yet concluded an agreement on an emergency service, its content and scope could also be determined by the courts. A consideration of the legal interests affected here, which are protected by fundamental rights, based on the principle of proportionality, shows that the defendant must participate in the requested emergency service for the transport of school-age children during a strike on school days that is not announced by it at least four calendar days in advance. As a result, the plaintiff is entitled to the establishment of the requested emergency service.

It is true that wave strikes are not already inadmissible if they relate to a public service organisation. However, due to their short notice periods, they require special consideration of the fundamental rights of third parties. In the present case, the strikes were accompanied by considerable interference with the physical integrity of persons subject to compulsory school attendance, which impaired their fundamental rights under Sec. 2 and Sec. 7 of the German Constitution. Due to the

short notice periods, alternative transport options often cannot be organised, which leads to the necessity of more dangerous journeys on foot. Without parental help, these pupils may not be able to get to school at all. The temporary emergency service and the emergency service to be set up would therefore have to be orientated towards lesson times.

Inflation adjustment premium as attachable earned income

The inflation compensation premium paid by the employer is earned income and as such can be seized. The premium is part of the recurring payable earned income.

German Federal Court of Justice (Bundesgerichtshof – BGH), decision of 25 April 2024 - IX ZB 55/23

The case

Insolvency proceedings were opened over the assets of the debtor, who is employed as a nurse by the employer, on 27 February 2023 after he had previously filed a corresponding application on his own behalf. For mid-2023 and mid-2024, the debtor was promised an inflation adjustment bonus of EUR 3,000 by the employer in two instalments of EUR 1,500 on 30 June 2023 and 30 June 2024. Shortly before the first instalment was paid out, the debtor applied for the premium to be unseizable and released, which was rejected by the courts.

The decision

The BGH also ruled in this sense that the inflation compensation premium was attachable as earned income in accordance with Sec. 850c German Civil Procedure Coder (Zivilprozessordnung - ZPO). In contrast to the energy price lump sum, the legislator had not provided for the premium to be unattachable. In addition, the inflation compensation premium is an additional benefit voluntarily paid from the employer's own funds in addition to the salary and therefore earned income within the meaning of Sec. 850 (1) ZPO. In the present case, the protection against attachment for the inflation compensation premium would be assessed in accordance with Sec. 850a-850h ZPO, in particular Sec. 850c ZPO, and not in accordance with Sec. 850i (1) Sentence 1 No. 1 ZPO for non-recurring remuneration. The bonus is part of the recurring payable labour income, even if it is formally designated as a one-off payment and was only paid once. The decisive factor is that the bonus increases the current salary and remunerates regular work performance.

In addition, the bonus does not constitute an unseizable hardship allowance pursuant to Sec. 850a no. 3 ZPO due to the lack of a special burden in or through the performance of the work. Furthermore, it is also not unseizable as an expense allowance pursuant to Sec. 850a no. 3 ZPO, as no expenses actually incurred are to be reimbursed. The inflation compensation premium merely serves to mitigate the increase in consumer prices. In contrast to state aid measures, there is no obligation for the recipient to use the money for a specific purpose. Since a simple earmarking in this case is not sufficient to change the content of the claim upon assignment, the prohibition of assignment does not apply. Finally, there is also no undue hardship pursuant to Sec. 765a ZPO, as only half of the premium can be seized pursuant to Sec. 850c ZPO and there is also the possibility of an application pursuant to Sec. 850f (1) ZPO. The half of the premium remaining exempt from attachment could be used to mitigate the price increases.

Cancellation access: shipment status does not constitute prima facie evidence

If the receipt of a written declaration is disputed and the sender, who bears the burden of presentation and proof, invokes receipt by the recipient by registered post, the combination of proof of posting and the status of the consignment at the post office does not constitute prima facie evidence of receipt.

Higher Labour Court (Landesarbeitsgericht - LAG) Baden-Württemberg, decision of 12 December 2023 - 15 Sa 20/23

The case

The plaintiff was employed by the defendant as a medical assistant. The defendant terminated the employment relationship by letter dated 14 March 2022. The plaintiff filed an action for unfair dismissal. In the course of the proceedings, the defendant claimed to have terminated the employment relationship a second time by letter dated 26 July 2022, which the plaintiff received as a registered letter on 28 July 2022. She submitted a proof of posting and the status of the letter. The plaintiff denied receipt. The defendant subsequently made further attempts to terminate the contract, most recently on 3.12.2022. The Labour Court deemed the termination of

14 March 2022 to be invalid, but the termination of 26 July 2022 to be valid.

The decision

However, the Baden-Württemberg Higher Labour Court found that the employment relationship was only terminated with the ordinary notice of 3 December 2022. With regard to the second notice of termination of 26 July 2022, the receipt required for effectiveness had not been proven. The defendant had not provided any proof of receipt - for example by naming the deliverer as a witness. The actual requirements for the assumption of prima facie evidence of receipt of the notice of termination were also not met. If no proof of delivery is submitted, but only the status of the consignment, this does not constitute prima facie evidence, even in combination with the proof of posting. If a reproduction of the delivery receipt could no longer be obtained, this would fall within the sender's sphere of risk. The appeal was authorised due to its fundamental importance.

■ INTERNATIONAL NEWSFLASH FROM UNYER

Austria: Teleworking is the new home office

During the COVID-19 pandemic, Austrian lawmakers introduced work from home into Austrian labour law. At the same time, however, other practised forms of mobile working, in particular working from locations other than one's own place of residence, were not covered by these regulations. From 1 January 2025, the term "home office" will therefore be replaced by "teleworking" by the Austrian legislator.

The "home office" regulations apply to employees who regularly carry out their work from their main and/or secondary residence and/or the home of a close relative and/or partner. The future regulation on "teleworking", on the other hand, will apply to all employees who regularly carry out their work simply at a location outside the employer's business premises. As a result, employers will be obliged to provide their employees who telework with "digital work equipment" (PC/laptop, mobile phone, data connection, etc.). Agreements on teleworking must be made in writing, whereby employees are neither entitled to teleworking nor can they be obliged to do so by the employer. The changes apply to all teleworking agreements concluded after the coming turn of the year. Existing home office agreements must be reviewed and revised.

In addition to the labour law aspects, "teleworking" brings with it new challenges for employers, particularly with regard to data protection and data security. The employer remains the data controller and is liable for any breaches of the GDPR that occur while an employee is teleworking. Employers who wish to introduce teleworking must review and, if necessary, adapt their technical and organisational measures to ensure data security and data protection.

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■ GENERAL INFORMATION

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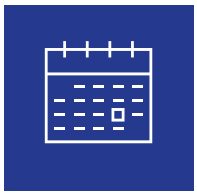
Events, publications and blog



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