Baker McKenzie.

Hot Topics

Employment
Germany

April 2019

News regarding vacation law:

Employer's obligation to provide information, reduction of leave entitlements during parental leave and no annual vacation during special leave

In February and March 2019, the Federal Labor Court (BAG) made several decisions on vacation law that are highly relevant to operational practice. The decision on the employer's obligation to provide information attracted great attention from the professional public. The entitlement of employees to paid annual leave usually only expires if the employer has previously duly informed the employee of the specific holiday entitlement and the periods of expiry (decision dated February 19, 2019 - file no.: Az.: 9 AZR 541/15).

Two other decisions of the highest German labor court promise companies a large gain in flexibility. The Federal Labor Court has confirmed that employers can reduce the leave entitlement by one twelfth for each full calendar month of parental leave (BAG, decision dated March 19, 2019 - file no.: 9 AZR 362/18). Furthermore, the Federal Labor Court decided that there is no entitlement to annual vacation if employees do not work continuously in a calendar year due to a contractually agreed special leave (BAG, decision dated March 19, 2019 - file no.: 9 AZR 351/17).

Problem outline

In the first case, the defendant employer employed a scientist for more than twelve years. After the termination, the employee requested compensation of vacation for 51 days in the amount of approximately EUR 12,000,-- (gross). The employee had not applied for the vacation during the employment relationship.

Each of the lower instances decided in favor of the plaintiff. The Regional Labor Court of Munich ruled that the claim for leave of the employee had expired at the end of the year (decision dated May 6, 2015 - file no.: 8 Sa 982/14). However, the employee was entitled to damages in the form of substitute leave. The Regional Labor Court explained that the employer had not fulfilled its obligation to grant the employee vacation on time. The substitute leave entitlement should rather be settled with the termination of the employment relationship.

Decision of the Federal Labor Court on the employer´s duty to provide information

The Federal Labor Court decided that employers are obliged to notify their employees clearly and timely that the vacation is likely to lapse at the end of the reference period or a transfer period.

Our Expertise
Employment

In accordance with § 7 III 1 Federal Vacation Act (BUrlG), the leave must be granted and taken in the current calendar year, unless a transfer to the next calendar year is possible. Furthermore, in accordance with § 7 I 1 BUrlG, the vacation preferences of employees must be taken into account when setting the time of vacation. This does not apply if urgent business concerns or vacation preferences of other employees who take precedence from a social point of view, are opposed to the concerns of the employees. The employer therefore bears the initiative burden for the realization of the leave entitlement. By way of interpretation of § 7 BUrlG in line with the respective European Directive, vacation is not usually forfeited if the employer has failed to specifically inform the employee that vacation expires at the end of the holiday year or transfer period. Until now, the Federal Labor Court has only published a press release on its decision. A detailed justification is still pending.

Consequences of the current decision of the Federal Labor Court for the forfeiture of vacation

According to the previous legal situation, vacation which has not been granted generally expires at the end of the calendar year, but not later than March 31 of the following year (BAG, decision dated November 28, 2018 - file no.: 8 AZR 570/89). Until now, employees only received a claim for damages (so-called substitute leave entitlement) for vacation not taken (BAG, decision dated August 6, 2013 - file no.: 9 AZR 956/11). However, the European Court of Justice has initiated a change in this regard and has established that untaken leave does not expire beyond December 31, respectively March 31 of the following year, if the employer does not ensure that the employees are actually able to take their paid annual leave, by – if necessary – formally requesting them to do so. These requirements are implemented by the Federal Labor Court in its current fundamental decision.

Forfeiture of vacation not taken

In this context, further questions about the forfeiture of vacation which has not yet been taken arise if employees are unable to take their leave due to incapacity to work. In this case, in accordance with § 7 III 2, 3 BUrlG, it will not be forfeited, but remains a leave entitlement according to the jurisprudence of the European Court of Justice and the Federal Labor Court (ECJ, decision dated January 20, 2009 - file no.: C 350/06, C-520/06; BAG, decision dated March 24, 2009 - file no.: 9 AZR 983/07). Even in the case of a long-term disability, the leave generally expires after 15 months (ECJ, decision dated November 22, 2011 - file no.: C-214/10). An exception to this ceiling applies if the employer's conduct is not worthy of protection: The European Court of Justice argued that such conduct exists for example if the employee has worked continuously for his employer without taking leave. In this situation the interests of the parties would be different, since the employer benefits from the employee's full working capacity (ECJ, decision dated November 29, 2017 - file no.: C-214/16). Exceptions to the forfeiture of vacation may apply on maternity leave (Maternity Protection Act: MuSchG), or on parental leave (Federal Parental Allowance and Parental Leave Act: BEEG).

Further decision of the Federal Labor Court with regard to the reduction of leave entitlements during parental leave

Under § 17 I 1 BEEG employers are entitled to reduce the leave entitlement proportionately during parental leave. However, it was unclear whether this regulation was compatible with European Law.

Insofar, a most recent decision of the Federal Labor Court (dated March 19, 2019 - file no.: 9 AZR 362/18) confirmed some flexibility for companies in relation to the

vacation entitlement during parental leave: The employer can reduce the vacation entitlement by one twelfth for each full calendar month of parental leave (§ 17 I 1 BEEG). The BAG has held that this right to reduce the vacation entitlement is compliant with European Law. Insofar, it is important that the employee is aware that the employer will actually make use of the reduction. Therefore, a respective statement towards the employees on parental leave has to be issued.

No vacation during special leave

For companies, another decision from the same day is interesting (BAG, decision dated March 19, 2019 - file no.: 9 AZR 351/17): The Federal Labor Court ruled that periods of unpaid special leave should not be taken into account when calculating the statutory leave entitlement. The fundamental idea behind the decision of the Federal Labor Court is convincing: Employees who do not perform work due to special leave do not require annual vacation. The Federal Labor Court rejects a double vacation entitlement.

Practical significance

The decisions of the Federal Labor Court rejecting statutory leave entitlements during special leave and on the possibility of reducing the parental leave provide clarity based on a conclusive concept: Employees who are not actually performing their working duties do not have a legal entitlement to annual vacation. In this respect, companies should ensure that necessary declarations are submitted in due time and form.

The decision of the Federal Labor Court on the notification obligations of the employer regarding vacation entitlements and exclusion periods is not surprising. However, it requires an adaptation of the personnel administration system.

It is thus recommended that the employer informs the employees in writing about the end of year forfeiture of vacation at the beginning of the last quarter in October at the latest. In case a high leave entitlement still exists, providing this information even earlier might be expedient. Whether providing the information at the beginning of the relevant vacation year is "timely" within the meaning of the new ruling of the Federal Labor Court is doubtful. Possibly, the publishing of the reasons for the decision will give further insight on this.

On the other hand, reactions on the employee side are foreseeable: It is to be expected that companies will receive many vacation applications for the last quarter. If the employer refuses the leave, this will result in a transfer or a substitute leave entitlement.

For further information, please contact:

Katja Häferer
Katja.Haeferer@bakermckenzie.com

Dr. Felix Diehl
Felix.Diehl@bakermckenzie.com

Baker & McKenzie - Partnerschaft von Rechtsanwälten und Steuerberatern mbB

Berlin
Friedrichstraße 88/Unter den Linden
10117 Berlin
Tel.: +49 30 2 20 02 81 0
Fax: +49 30 2 20 02 81 199

Frankfurt am Main
Bethmannstraße 50-54
60311 Frankfurt am Main
Tel.: +49 69 2 99 08 0
Fax: +49 69 2 99 08 108

Dusseldorf
Neuer Zollhof 2
40221 Düsseldorf
Tel.: +49 211 3 11 16 0
Fax: +49 211 3 11 16 199

Munich
Theatinerstraße 23
80333 München
Tel.: +49 89 5 52 38 0
Fax: +49 89 5 52 38 199

www.bakermckenzie.com

Get Connected: