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MINIMUM WAGES IN GERMANY

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As yet there is no consensus on the issue of minimum wages in Germany. Two recent bills reveal the depth of the disagreement. On September 1, 2012, the Bremen State Minimum Wage Act (*Bremer Landesmindestlohngesetz*) entered into force, which established a minimum wage exclusively for employees of this northwestern state. Barely three weeks later, the German Federal Council forwarded to the German Federal Parliament a bill for a minimum-wage act designated for the Federal Republic as a whole.

STATUS

Germany is sharply divided over the introduction of minimum wages. This is especially apparent in comparison with the other Member States of the European Union. For the year 2011, the German Federal Statistical Office reported about 20 Member States in which a statutory monthly minimum wage was applicable (in considerably differing amounts, of course). These ranged from €123 in Bulgaria to €1,758 in Luxembourg.

In Germany, the introduction of a generally applicable statutory minimum wage has been denied for reasons pertaining primarily to constitutional law. The German

Basic Law (*Grundgesetz*) protects freedom of association, which, *inter alia*, reserves for the bargaining parties the determination of remuneration for work, along with working conditions. In recent years, however, the lack of a minimum wage in Germany has increasingly come under criticism. As a consequence, numerous bills were proposed, most of which failed.

However, on the basis of the Minimum Working Conditions Act (*Mindestarbeitsbedingungengesetz*), binding minimum wages have been introduced recently for certain sectors nationwide. In this context, there is still a distinction between the states of the former East Germany (the "new federal states") and those of the former West Germany (the "old federal states"), with Berlin generally included with the new federal states. The level mandated for the new federal states is usually approximately €1 less than that of the old federal states. The following chart shows the minimum hourly rates, in euros, for certain sectors in the old federal states as of August 1, 2012:

Waste industry	8.33
Main construction trade (workers, machine workers)	11.05
Main construction trade (specialist workers, machine operators, drivers)	13.40
Special mining works (workers, diggers)	11.53
Special mining works (diggers, specialist workers with special expertise)	12.81
Vocational training and further education	12.60
Roofing	11.00
Electrical work	9.80
Cleaning of buildings (inside and maintenance cleaning)	8.82
Cleaning of buildings (glass and façade cleaning, among other kinds)	11.33
Painting/varnishing (untrained employees)	9.75
Painting/varnishing (trained workers, journeymen)	12.00
Health-care sector	8.75
Security services (depending on the state)	7.00–8.75
Commercial laundry services	8.00
Temporary employment	7.89

Regardless of whether the employer is a member of an employer's association, the minimum wages apply automatically, and the employee may request the difference to an individually agreed lower salary on the basis of the statutory claim before the labor courts.

THE BREMEN STATE MINIMUM WAGE ACT

The aim of the Bremen State Minimum Wage Act, effective September 1, 2012, is to ensure that the employees of public or publicly financed and supported companies receive a minimum wage, which is currently fixed at €8.50 per hour. The Confederation of German Trade Unions (*Deutscher Gewerkschaftsbund*) requested that a similar law be introduced in Lower Saxony. It should be noted that minimum-wage regulations already exist in many federal states in connection with public procurement, with other states planning to introduce them. Indeed, as of this writing, only the states of Bavaria, Hesse, and Saxony have not established minimum wages for this sector.

BILL FOR A NATIONAL MINIMUM-WAGE LAW

The aim of the Federal Council's bill (printed paper 542/12 of the Federal Council) is to ensure by means of a national minimum wage that full-time employment generates an income sufficient to live on. The amount of the minimum wage is to be secured and annually reviewed by an independent commission. According to the bill, interference with the basic right of freedom of association, as mentioned above, is justified by the need to protect the common welfare. Whether the Federal Parliament will agree is uncertain. While there is little support for the bill among current members, a new balance of parties in the 2013 elections could lead to its eventual passage.

TRANSFER OF BUSINESS BY TAKEOVER OF PERSONNEL?

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In the classic example of a transfer of business, the acquirer takes over the essential operating assets from the previous owner of the business, and the corresponding employees consequently pass to the acquirer. Essentially, the economic unit and its identity are taken over by the new entity.

However, German labor courts have decided in multiple cases that merely employing the main staff of a business—or even taking over only the "highly qualified" employees (the "critical mass")—may constitute a transfer of business. This means that a company which solicits only the key employees of a competitor may be compelled to "receive" employees to whom no offer was submitted but who successfully argued that a transfer of business had taken place.

RECENT JUDGMENTS OF THE GERMAN FEDERAL LABOR COURT (*BUNDESARBEITSGERICHT*; BAG)

The takeover of personnel therefore ranks as high as other possible criteria when determining whether a transfer of business has taken place. In industries in which the essential factor is manpower, a group of employees working together who share a common purpose, such as the production of automobile components or the provision of financial services, can constitute an economic unit. This economic unit preserves its identity if the acquirer continues the respective activity and takes over those personnel who are essential according to number and expertise, i.e., the main staff. The individual structure of the business will determine how many employees, and which ones, may be taken over without necessitating the takeover of the entire staff.

On the assumption that employees in jobs requiring fewer qualifications are more easily exchangeable and that such employees are less "characteristic" of the business than their more highly qualified co-workers (who are less easily exchangeable), the BAG established the principle that the lower their qualifications are, the higher the portion of assumed employees must be in order for a transfer of business to occur. This means that the takeover of a small number of employees may also work in favor of a transfer of business (in addition to other criteria) if their jobs require high qualifications and involve expert knowledge.

Court rulings have shown a lack of uniformity when determining how many employees must be taken over for a transfer of business to occur, mainly because of the need to focus on the individual circumstances and to conduct an overall assessment. However, it may be stated that in the case of jobs which do not require highly qualified employees, the BAG requires nearly complete takeover of the staff; taking over 75 percent of the former employees, for example, will not suffice. The German regional labor courts, on the other hand, have at times assessed this quite differently, occasionally considering a smaller number of employees sufficient for a transfer of business. And in businesses characterized by working equipment, a transfer of business can occur without the takeover of personnel if the essential equipment is taken over.

The principles of the two latest BAG decisions may be summarized as follows:

1. BAG, judgment dated December 15, 2011 – 8 AZR 197/11 (*Guarding and Protection Business*):

- Mere succession in order or function does not constitute a transfer of business. (Here, the replacement of one security company with another was not deemed a transfer of business, since only the function of providing security was taken over, not the personnel.)
- Another assumption is to be made if essential working equipment is taken over.
- The takeover of the main staff also may work in favor of a transfer of business, since security-service companies are businesses with "little working equipment."
- A quantitative and qualitative assessment is required.
- In the case of businesses that use primarily less qualified employees, a larger percentage of employees may be taken over without triggering a transfer of business (example: for cleaning services, up to 60 percent of the old staff may be taken over; for security, up to 61 percent; and for collection and delivery services, up to 75 percent).
- In the current case, the "acquirer" took over only 57 percent of the security guards working on the property, so the BAG denied a transfer of business. In addition, the acquirer had not taken over any of the people responsible for the property (supervisors), whose takeover the BAG would probably have considered essential for a transfer of business (because such employees "characterize the business's identity in terms of quality").

2. BAG, judgment dated June 21, 2012 – 8 AZR 181/11 (*IT-Services Company*)

- IT-services businesses are characterized by the expert knowledge and qualifications of their employees.
- Because the employees of such a company are assumed to have a high level of qualification, the takeover of "far more than half" of these employees (here, 57.5 percent) is sufficient to assume preservation of the company's identity and thus a transfer of business.
- Taking over the inventory, the customer base, and the service maintenance contracts and hiring the managing director and the executives would constitute a transfer of business.
- A transfer of business is *not* affected by whether the acquirer newly establishes its own marketing and distribution structures and henceforth has a direct contractual relationship with end customers. Taking over the PCs, the telephone system, and all office rooms, as well as the company name, is also nondecisive, as is performing some company services from different rooms.

PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS AFTER A TRANSFER OF BUSINESS

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If employees are transferred to a new employer within the scope of a transfer of business, the latter assumes all the rights and obligations of the employment relationships existing at the time of the transfer.

TRANSFORMATION

Pursuant to Section 613 a Para. 1 Sentence 2 of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB), the provisions of the collective bargaining agreement (CBA) applying to the former business owner become part of the employment relationship between the employee and the new employer *unless* another CBA on the respective rights and obligations already applies. The provisions are "transformed"; i.e., they become part of the employment relationship with the acquirer (Section 613 a Para. 1 Sentence 2 BGB). This applies to CBAs between labor unions and employers' associations as well as to company CBAs.

In the case of a CBA between a labor union and an employers' association, the acquirer does not become a member of the employers' association but is merely "bound" to the CBA between the union and the association as it exists at the time of the transfer. Nevertheless, the binding effect of the CBA between the labor union and the employer's association applies even to company businesses that fall outside the professional area of the transfer. For example, the CBA of a metal-processing company will apply to any independent caterers to which the company's canteen is subsequently outsourced.

DYNAMICS

The provisions of a CBA will continue to apply, effectively "frozen" at the time of the transfer of business. Subsequent modifications to the CBA (e.g., standard wage increases, such changes collectively called the "dynamics") will have no further effect for transferred employees.

The opposite is true only if the dynamics of the CBA have a direct and mandatory effect, i.e., where the dynamics are an integral part of the CBA from the outset and do not depend on new negotiations between the employers' association and the union. In such a case, the dynamics are essentially transformable content pursuant to Section 613 a Para. 1 Sentence 2 BGB and remain in effect after the transfer, with the acquirer obligated to uphold them. A typical case is a graduated-wage agreement, in which certain regulations (e.g., a reduction of working hours or an increase in remuneration) are introduced gradually. Because these yet-to-be-enacted modifications were unconditionally agreed upon and formed part of the continuing CBA at the time of the transfer, the new employer is obligated to apply them after the acquisition.

TAKING EFFECT AS A PREREQUISITE

One prerequisite for the continued application of CBAs is for the CBA to be *in effect* at the time of the transfer of business; the mere fact that the CBA has been concluded will not suffice if it is not applicable until some future date. In other words, if the CBA was signed but has not yet become effective, its provisions do not form part of the rights and obligations that the employee may "take along." This was decided by the German Federal Labor Court (*Bundesarbeitsgericht*; BAG) in judgments dated May 16, 2012 (4 AZR 320/10, 4 AZR 321/10).

THE CASE

In 2004, a company and the trade union ver.di (*Vereinigte Dienstleistungsgewerkschaft*) concluded two CBAs: the first on a restructuring, providing for the suspension of standard wage increases and the cancellation of annual special payments for the years 2005 through 2007, and the second on an additional payment, according to which the employees would receive an annual sum of nearly €1,500 beginning in 2008 as compensation for their restructuring contributions. The CBA on the additional payment had already been signed but was not intended to become effective before 2008.

Within the scope of a transfer of business, the company's employment relationships were transferred to the acquirer as the new employer. In 2008, the employees requested the additional special payment from the acquirer. They stated that the claim had become part of the employment contract pursuant to Section 613 a Para. 1 Sentence 2 BGB and that although the CBA had not come into effect until after the transfer of business had occurred, the claim was not negated, since the agreement had already been signed at the time of the transfer. The acquirer refused the payment.

THE BAG'S DECISION

The BAG agreed with the acquirer and denied the employees' claim for the additional payment under the CBA. The claim for the additional payment under the CBA had not been part of the existing and/or stipulated rights and obligations under the employment relationship at the time of the transfer of business and therefore could not be transferred to the employment relationship with the acquirer. The fact that the CBA had already been executed and agreed upon at the time of the transfer does not change anything, because the only decisive factor in such a situation is the time when the CBA takes effect.

A PRACTICAL NOTE

In the event of a transfer of business, any collective rights at the time of the transfer that are directly and mandatorily applicable under collective bargaining law (i.e., apply more like statutory provisions than merely contractual ones) are frozen. In order to be transformed to a contractual right in the employment agreement, the CBA must have already taken effect; the mere conclusion of a CBA does not suffice. For this reason, while undertaking due diligence, the acquirer of a business must note the time CBAs take effect in order to identify the provisions applicable to the transferred employees.

NEW TAX LAW DEVELOPMENTS FOR PENSION COMMITMENTS

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During the past months, the German Federal Tax Court (*Bundesfinanzhof*; BFH) had several occasions to comment on individual issues connected with the accounting of provisions in the context of asset transactions between companies. This relates to the fact that German law does not offer much flexibility to simply agree which party keeps or assumes pension or anniversary liabilities. Normally these just follow the business as far as active employees are concerned, whereas liabilities relating to retired employees remain with the seller of the assets. From the perspective of the transferring company, these rulings provide opportunities. Thus, tax effects may be planned and realized by means of transfers within a group, which enable the neutralization of nonrecurring income by nonrecurring expenses.

One set of cases dealt with the value of an assumed anniversary provision or a provision for contingent losses, respectively, to be reported by a company purchaser on the balance sheet (BFH, judgment dated December 14, 2011 – I R 72/10; judgment dated December 16, 2009 – I R 102/08). Another set of cases related to the question of whether, after the assumption of an obligation to incur a pension liability by a third party, the originally obligated employer must continue to enter such pension commitment on the liabilities side (BFH, judgment dated April 26, 2012 – IV R 43/09).

TREATMENT AT THE ACQUIRER

The difficulty in the first set of cases was due to the fact that certain provisions, e.g., provisions for contingent losses, anniversary provisions, and pension provisions, were to be made according to commercial law; however, under tax law, such provisions were partly or totally irrelevant and/or were assessed lower than under commercial law. Finally, this resulted in a deferral of expenses; the profits were taxed earlier under tax law than they would have arisen under commercial law. The plaintiffs in those proceedings had assumed the respective obligation within the contractual scope of an asset deal. In the specific case of pension provisions, the obligations to former or retired employees would not have been transferred. Since the actual burden under commercial law exceeded the burden reported

under tax law, the company purchaser acquired so-called hidden liabilities. The question was: What is the right value for tax purposes?

1. In the decisions regarding the accounting of provisions assumed by the company purchaser, the First Senate of the BFH held that the liabilities should be assessed with the consideration received for the assumption of the obligation, quasi as acquisition cost on the liabilities side. According to the First Senate, the general accounting principles took priority in this respect. The BFH thereby arrived at the conclusion that the provisions should be assessed with the proportionate acquisition costs within the scope of the entire transaction, i.e., not the tax values.

2. This led to the question of how these liability items were to be developed in the accounting period. The tax offices and the German Federal Ministry of Finance (*Bundesministerium der Finanzen*; BMF) held the view that the tax law regulations on the assessment of provisions applied on the next balance-sheet date (BMF, circular dated June 24, 2011, *Federal Tax Gazette* (*Bundessteuerblatt*; BStBl) I 2011, 627). This view meant that the company purchaser would have to release the provisions in whole or in part by the next balance-sheet date. The consequence would be a taxable income. The BFH did not support this view, as it held the opinion that this would result in the acquisition processes' finally affecting the net income, which contradicted the fundamental accounting principles. In addition, the acquired provisions were not to be recorded with the tax balance-sheet value on the next call date, i.e., the balance-sheet date following the acquisition, but were to be assessed with the continued "acquisition costs" until the tax balance-sheet value had been reached. This would not result in an immediate income at the level of the company purchaser.

TREATMENT AT THE ORIGINALLY OBLIGATED COMPANY

In the second set of cases, the question of the accounting at the discharged company was disputed.

1. The tax office and the BMF held the view that the company had to report a pension provision as before, since an obligation to the employees continued to exist. They further stated that the consideration paid to the assumer of the obligations was to be capitalized as a receivable (BMF paper dated December 16, 2005, BStBl I 2005, 1052) and that the transaction therefore did not affect the income.

The Fourth Senate of the BFH in charge of the matter decided in favor of the taxpayer that the latter did not have to report any provisions for pension commitments to its employees if a third party, i.e., an acquirer, assumed the obligations by way of a collateral promise including an (internal) assumption of the obligations to perform. In this context, the BFH distinguished whether: (i) the acquirer promised the performance of the

pension obligations only vis-à-vis the party obligated to pay the pension (i.e., the discharged company), although the employee could not demand them from the third party itself; or (ii) the third party also assumed the debt by way of a promise to the employees, and thus the employee *could* demand the pension directly from the third party itself. Only in the latter case was it not probable—in the opinion of the BFH—that claims were asserted against the originally obligated party. The BFH thereby applied fundamental accounting principles, according to which provisions would have to be made only in the event and to the extent that a future assertion of claims was probable.

The application of this principle also means that a discharged company has to examine whether the acceding third party will fulfill its obligations in the future. If there are any doubts in this respect, the originally discharged company has to make provisions once more. This may again result in differences between commercial and tax law.

2. The BFH also objected to a capitalization of the paid consideration as receivable from the acquirer and to a dissolution over the term of the pensions. Since tax pension provisions are reported at a lower amount than the actual burdens to be expected, the consideration to be paid to the third party exceeded the amount of the tax pension provision. The differential amount resulting therefrom is an immediate tax-deductible expense. For the discharged company, this resulted in the possibility of bringing forward the tax-effective expense for future pension payments.

SUMMARY

Even though the court rulings are difficult to comprehend in detail due to their reasons, and even though they have aroused criticism in the literature (Bareis, FR 2012, p. 385; Siegel, FR 2012, p. 388; M. Prinz, FR 2012, p. 409), their results are to be welcomed. Taxable income in connection with the acquisition of a company is avoided. From the purchasers' perspective, asset deals become less risky in terms of tax.

FACILITATION OF IMMIGRATION OF SPECIALIZED PERSONNEL—THE EU BLUE CARD

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On August 1, 2012, the German act implementing the EU directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment became effective in Germany. The new law facilitates the immigration of foreign personnel

with advanced education and is thus an important factor in safeguarding the supply of specialized personnel in Germany. The key provision of the new law is the EU Blue Card, which, as a fundamental residence permit, complements the national arrangements regarding indefinite residence permits.

PREREQUISITES FOR GRANTING

The introduction of the EU Blue Card has reduced many of the previously existing barriers to the immigration into Germany of foreign specialized personnel.

The complex point system previously in use has been replaced by two prerequisites:

1. The applicant must provide proof of a university degree or comparable qualifications.

   Thus, the beneficiaries of this law are primarily graduates of foreign universities who want to work within their professions in Germany.

2. The applicant must provide proof of an employment contract with an annual gross salary of at least €44,800.

   This represents a significant reduction from the previous salary threshold of €66,000. For members of "understaffed" professions—natural scientists,* mathematicians, engineers, physicians, and IT specialists—the salary threshold is even lower: only €34,944 per year.

* Astronomers, biologists, chemists, Earth scientists, and physicists.

■ **NO "GERMANS FIRST" EXAMINATION/CHECK**

Previously, a foreign applicant could not be hired until it was proved that the position in question could not be filled by a German citizen. Under the new law, this time-consuming process is not required if the minimum salary threshold is exceeded.

■ **RESIDENCE INITIALLY PERMITTED FOR FOUR YEARS**

When granted for the first time, the EU Blue Card will be made out for the term of the employment contract plus three months, but for no more than four years. After the card holder has been employed for three years—provided he/she has a good command of the German language—he/she will receive an indefinite residence permit. Any periods during which the foreigner has resided in other EU member states with the EU Blue Card will be factored into the calculation.

■ **"ONWARD MIGRATION" TO OTHER EU MEMBER STATES**

After 18 months, the EU Blue Card opens the possibility of working in another member state in the European Union. In most EU member states, no visa is necessary for this "onward migration"—a clear advantage in comparison with national residence permits. However, a change of employment within the first two years of receipt of the Blue Card is subject to approval by the authorities.

■ **APPLICATION FOR GERMAN CITIZENSHIP**

After eight years of habitual and lawful residence in Germany, the holder of an EU Blue Card has the option of applying for German citizenship (Section 10 of the German Citizenship Act, *Staatsangehörigkeitsgesetz*; StAG).

■ **FAMILY MEMBERS AND SPOUSES**

The spouses, life partners, and children of holders of the EU Blue Card are allowed to move to Germany immediately or at a later date. No proof of knowledge of the German language is necessary. In addition, spouses and life partners may enter into employment immediately upon arrival in Germany.

■ **VISA FOR THE EMPLOYMENT SEARCH**

A graduate of a foreign university who does not have a specific job offer may be granted a visa enabling him/her to search for employment in Germany for up to six months. If the graduate finds an employer during this period, he/she can apply for the EU Blue Card directly in Germany. In the future, foreign graduates of German universities will be allowed to search for employment in Germany for a period of 18 months—i.e., six months longer than before.

RECENT DEVELOPMENTS IN VACATION LAW

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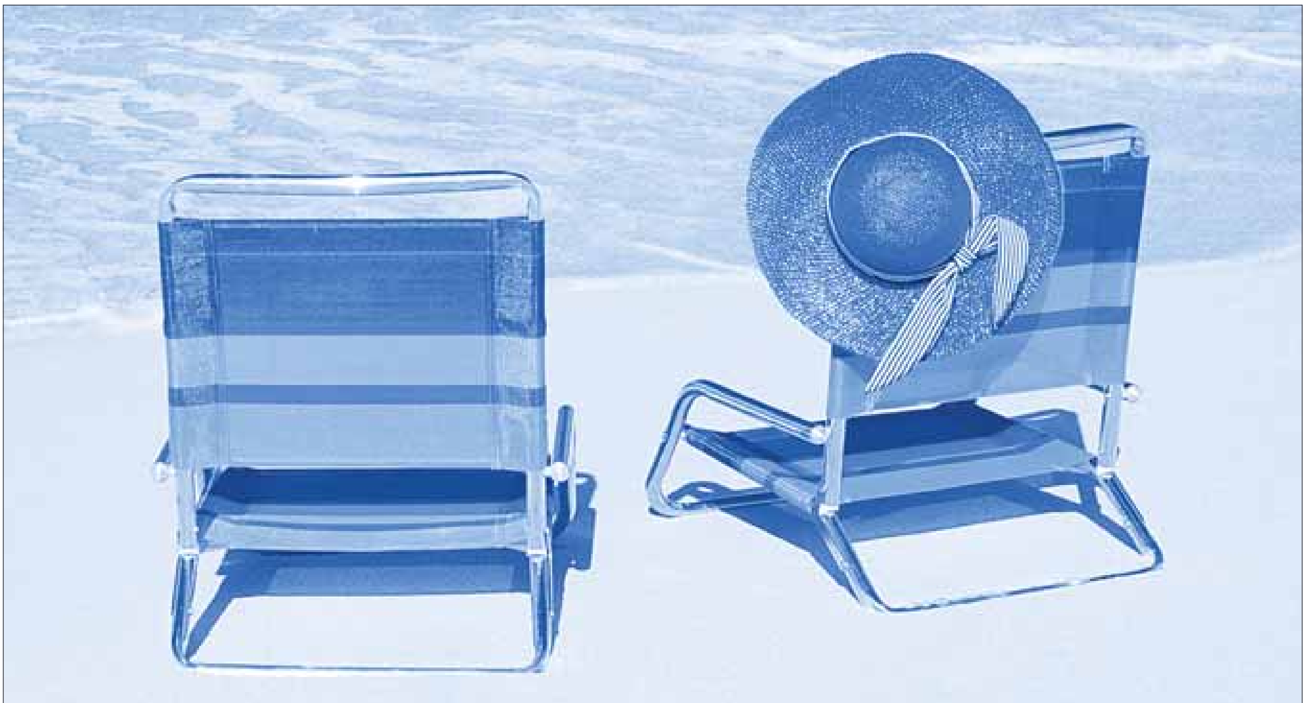
Vacation is an important aspect of the employment relationship. Problems in this context arise mostly when employment is interrupted by long-term illness or concluded by termination or death. Several recent decisions have addressed this issue.

■ **PAYMENT IN LIEU OF VACATION—ABANDONMENT OF THE "SURROGATE" THEORY**

The German Federal Vacation Act (*Bundesurlaubsgesetz*; BUrlG) assumes the basic principle that vacation is to be granted and taken in each calendar year and will lapse if not taken. As an exception to this rule, carry-over to the next quarter is possible if "urgent operational reasons or reasons concerning the person of the employee justify this" (Section 7 Para. 3 Sentence 2 BUrlG); "reasons concerning the person of the employee" are usually health issues. Upon the expiration of the three-month carry-over period, the vacation lapses unless a further exception occurs, i.e., an incapacity to work extending beyond the transfer period. This extension was introduced in accordance with the established practice of the European Court of Justice (ECJ).



A further provision holds that if vacation cannot be taken due to the employee's termination, financial compensation is to be paid (Section 7 Para. 4 BUrlG). In this context, the German Federal Labor Court (*Bundesarbeitsgericht*; BAG) thus far has treated the compensation payment as a "surrogate" of the actual grant of vacation and has therefore based its expiration on the same time periods that apply to the expiration of the actual vacation claim.

In a case dated May 4, 2010 (9 AZR 183/09), the BAG indicated that it intended to abandon the surrogate theory; in a judgment dated June 19, 2012 (9 AZR 652/10, Press Release 43/12), it actually did so, deeming the statutory vacation claim a "purely pecuniary claim" that is not subject to the time limits of the BUrlG. Contrary to the judgment of 2010, the BAG expressly confirmed that an incapacity to work is not relevant in this context. For employers, this means that vacation which has not lapsed but cannot be taken due to termination will regularly have to be compensated for and that employees may assert this compensation claim after December 31 of the vacation year and/or March 31 of the subsequent year. Section 195 of the German Civil Code states that the compensation claim is subject to a three-year statute of limitations unless a shorter preclusive period under a collective bargaining agreement or employment agreement is already in effect.

■ SCALING OF THE DURATION OF VACATION DEPENDING ON AGE

In a judgment dated March 20, 2012 (9 AZR 529/10, Press Release 22/12), the BAG held that granting older employees more vacation time than younger employees constitutes discrimination against the young. In this particular case, the employer granted employees 26 vacation days until the 30th birthday, 29 days until the 40th birthday, and 30 days thereafter. The action was brought by a female employee entitled to 29 vacation days who also requested the 30th day. In this case, the BAG could find no justification for disadvantaging those under 40 and thus held that vacation time must be equal for all. Nevertheless, the court recognized that additional vacation days might be justified for employees nearing retirement, since these workers usually have decreased resistance to fatigue, illness, and stress. Consequently, while employers can avoid charges of age discrimination by granting the same amount of vacation time to all employees, it may also be permissible to provide extra time to those in their 50s and 60s.

■ RELEASE FROM WORK BY SET-OFF AGAINST VACATION

In the context of terminations, it frequently happens that the employer wants to release the employee from work during the notice period. This usually includes the desire to set

off the release time against the employee's vacation time. From the BAG judgment dated May 17, 2011 (9 AZR 189/10, Press Release 37/11), it may be inferred that the employer can also release the employee in advance from the vacation time owed to him/her in the following year if the notice term extends from one year to the next. The judgment held that the employer must clearly express whether the set-off refers to all of the employee's vacation time or only part of it, with the employer bearing the risk resulting from any ambiguous statements.

In the case at hand, on November 13, 2006, the employer notified the employee of the termination of the work relationship, effective March 31, 2007. The employee was to receive remuneration while being released from work, combined with a set-off against his vacation days during the four-and-a-half-month notice period. When the termination was subsequently held to be ineffective, the employee returned to work after the scheduled termination date.

Had the termination been effective, the employee would have been entitled to partial vacation for 2007 (pursuant to Section 5 Para. 1 c) BUrlG), so a dispute arose as to how much of the vacation claim from 2007 had already been granted. The employer contended that the employee had used all his vacation time for 2007 during the notice period; the employee stated that he was entitled to additional vacation because the employer's statement at the time of the notification had been unclear. The BAG sided with the employee because of the ambiguity in the original statement. Had the employer clearly informed the employee that the release from work covered *any* vacation claim, no further time would have been awarded.

LAPSE OF VACATION CLAIMS

As stated above, payments in lieu of vacation come into consideration only if the vacation has not lapsed. A BAG judgment dated August 9, 2011 (9 AZR 425/10; Press Release 64/11) returned to this issue, providing further guidance on when vacation can be held to have lapsed. The complaining employee in this case had been continuously incapable of working due to illness from 2005 through the middle of 2008, at which time he returned to his duties. In the second half of 2008, he was granted 30 vacation days. In 2009, however, the employee demanded a declaratory judgment stating that he was entitled to 90 additional vacation days covering the years 2005 through 2007.

The BAG denied this. It stated that an employee who recovers early enough in the calendar year to take all his/her accumulated vacation days within that year must do so. Failure to take the vacation before the end of the year will cause the claim for accrued vacation time to lapse. In this case, the employee's claim for the accumulated vacation time lapsed on December 31, 2008.

In the meantime, the ECJ also passed guiding decisions on the total amount of vacation that can be accrued. Following a series of rulings indicating that employees incapable of working due to illness could accumulate vacation claims to an unlimited extent, the court now appears to be accepting limits. In a judgment dated November 22, 2011 (Case C-214/10), the ECJ made no objection to a transfer period of 15 months under collective bargaining law. Since the substantiation applied by the ECJ is applicable to statutory vacation pursuant to the BUrlG, accumulation of three years' worth of vacation should no longer be feared.

TRANSFERABILITY BY SUCCESSION

Last but not least, the BAG dealt with the question of the transferability of vacation claims by succession. The fact that a deceased employee cannot take vacation goes without saying. However, the question might be raised whether his/her heirs could assert a monetary claim against the employer. In this particular case, the employee in question had been employed during the years 2008 and 2009 but suffered from a long-term illness that prevented him from taking his vacation. After his death, his heirs requested payment from the employer in lieu of vacation, which the Regional Labor Court awarded. However, in a judgment dated September 20, 2011 (9 AZR 416/10, Press Release 72/11), the BAG decided differently: it assumed that a vacation claim becomes extinct with the employee's death and is not transformed into a claim for payment, pursuant to Section 7 Para. 4 BUrlG.

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