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BE AWARE

EMPLOYMENT LAW NEWSLETTER

CONTENTS

- I. New Family Care Leave Act
(*Familienpflegezeitgesetz – FPfZG*)
- II. No right to repeated leave under
the Nursing Care Leave Act
(*Pflegezeitgesetz – PflegeZG*)
- III. Limitation of the right to
payment of compensation for
annual leave to 15 months in the
case of illness-related absence
from work over a longer period
- IV. Taking into account temporary
employees in the determination
of threshold values in the case
of operational changes
- V. Internal news: New partner joins
the Cologne office

INTRODUCTION

This issue of **BE AWARE** once again brings our readers up to date on current, practice-relevant developments in the area of employment law. The Bundestag has passed a new Family Care Leave Act that is intended to give employees further possibilities for combining employment and care of family members. In a case involving the Nursing Care Leave Act, which is a separate piece of legislation that had already gone into effect in July 2008 and complements the new Family Care Leave Act, the Federal Labor Court had to decide whether the legally permissible maximum leave can be divided into a series of shorter periods. We also discuss a more recent judgment of the Federal Labor Court concerning the question as to whether temporary personnel are to be counted as part of the company's workforce for the purposes of determining whether the company must negotiate restructuring measures with the company's works council because of its size.

I. NEW FAMILY CARE LEAVE ACT (FAMILIENPFLEGEZEITGESETZ – FPfZG)

The Bundestag adopted the Family Care Leave Act on 20 October 2011, and this legislation will enter into effect as of 1 January 2012. The purpose of this new law is to improve possibilities for combining employment and care for family members. The law will not, however, supersede the provisions of the Nursing Care Leave Act (*Pflegezeitgesetz – PflegeZG*), which has already been in effect since July 2008, but will make it even easier for an employee to care for a close relative in the home environment since that employee's working hours may be reduced by up to 15 hours a week for a period of up to 24 months.

The law does not, however, establish a right to such leave for the purposes of caring for a relative; a written agreement must first be concluded between the employee and the employer. As regards compensation, the Family Care Leave Act calls for the employer to make up for 50% of the shortfall in compensation due to the reduction in working hours during the leave period. The increase will be financed either by taking the extra compensation from a credit balance due the employee or through the employer, who will be able to apply to the Federal Office of Family Affairs and Civil Society Functions (*Bundesamt für Familie und zivilgesellschaftliche Aufgaben* – BAFzA) for an interest-free loan. After the employee returns to work on a full-time basis, an amount equal to that added to the employee's prorated wages or salary during the period of leave will then be withheld from the employee's wages or salary at the same rate until the original credit balance is restored (referred to as post-care phase). In the case of a full-time employee, for example, that means the employee's working hours may be reduced by a maximum of 50%, in which case the employee would receive 75% of his or her salary for the duration of the period of leave, i.e., up to two years. After the care phase, the employee will then resume full employment and continue to receive 75% of his or her salary until the original credit balance is restored.

The law also makes provision for the same additional protection against dismissal as that provided under the Nursing Care Leave Act, which means the employer cannot terminate the employment relationship during the leave period or post-leave phase without the approval of the responsible public authorities.

CONCLUSIONS

By enacting the Family Care Leave Act in addition to the Nursing Care Leave Act, which had already gone into effect in July 2008, the legislature created a additional model that enables employees to continue working and at the same time care for a close relative in the home environment. This new legislation, which does not give employees a legal right to leave for the purposes of caring for family members, but allows employers to grant such rights at their discretion, goes beyond the provisions of the Nursing Care Leave Act. The Family Care Leave Act now even makes it possible to continue to work fewer hours per work for up to 24 months. The Nursing Care Leave Act, on the other hand, makes provision for unpaid leave for up to a maximum of 10 working days in the case of acute need and complete or partial leave for a maximum of six months. It is, however, not possible to combine leave under the Nursing Care Leave Act and the Family Care Leave Act.

II. NO RIGHT TO REPEATED LEAVE UNDER THE NURSING CARE LEAVE ACT (PFLEGEZEITGESETZ – PFLEGEZG)

The Nursing Care Leave Act, which is discussed above, also obligates employers to release personnel from their duties, either completely or partially, to care for close relatives under certain circumstances. However, this law limits the duration of care for close relatives to six months. Up to now, there was some question as to whether leave for the purposes of providing nursing care had to be taken without interruption or whether it was possible to take leave to care for a relative and take leave again to care for the same relative until the maximum period of leave was reached.

In its judgment of 15 November 2011 (9 AZR 348/10), the Federal Labor Court ruled that repeated leave was not an option. The maximum period of leave for the purposes of providing nursing care may not be taken in several installments. This case involved an employee who had taken leave to care for a relative from 15 to 19 June 2009. On 9 June 2009, the employee announced his intention to take leave again for the purposes of caring for his mother on 28 and 29 December 2009. The employer refused to give his permission. The employee was of the opinion that he was entitled to leave for a period of up to the maximum duration of six months even if he took this leave in several installments.

The Federal Labor Court concurred with the opinion of the lower courts to the effect that the first sentence of section 3(1) of the Nursing Care Act limits leave for the purposes of providing nursing care for close relatives to a single instance. The court ruled that right expires as soon as it is exercised, even if only for a brief period.

CONCLUSIONS

The law only extends the possible duration of leave for the purposes of caring for a relative, but makes no provision for repeated leave. If an acute need for nursing care should arise again, employees still have the option of taking short periods of leave to provide such care. For employers, the decision of the Federal Labor Court means greater planning security and protection against abusive practices. Employers do not have to contend with the possibility that an employee will take advantage of the right to care for the same relative within a short period of time. Furthermore, since employees cannot take leave to provide nursing care for close relatives in several installments, they will not be able to benefit from the special protection against dismissal that remains in effect until the end of the period of leave each time they announce the intention to take such leave.

III. LIMITATION OF THE RIGHT TO PAYMENT OF COMPENSATION FOR ANNUAL LEAVE TO 15 MONTHS IN THE CASE OF ILLNESS-RELATED ABSENCE FROM WORK OVER A LONGER PERIOD

In its judgment of 22 November 2011 (Case C-214/10), the European Court of Justice (ECJ) ruled that the right of an employee who is disabled for a longer period of time to receive payment in lieu of paid annual leave under a collective agreement may be limited to 15 months.

The plaintiff, who had been employed by a German company since 1964, was covered by a collective agreement under which (i) the employee had a right to 30 days of paid annual leave per year, (ii) payment in lieu of unused annual leave was permissible only upon termination of employment and (iii) paid annual leave not taken due to illness expired with effect as of the end of a carryover period of 15 months from the end of the period during which the leave accrued (calendar year). The plaintiff fell ill in the year 2002 and was unfit for work until his employment relationship ended in August 2008. In 2009, he brought an action against his employer to obtain payment in lieu of accrued paid annual leave for the years 2006 to 2008. The court seized of the matter, the Hamm Higher Labor Court, found that the claim to annual leave for the year 2006 had expired under German legislation and the collective agreement since the carryover period had lapsed. This court asked the ECJ whether this practice was consistent with the Working Time Directive (Directive 2003/88/EC). The ECJ's response was affirmative.

According to the ECJ, European Union law does not preclude national legislation or collective agreements that call for accrued paid annual leave to lapse after 15 months in the case of employees who are unfit for work over a period of several years since a right to accumulate paid annual leave while unable to work for a period of several years would no longer be compatible with the purposes of paid annual leave. The court reasoned that the purpose of annual leave was twofold – to permit recuperation from work and to make available time for relaxation and leisure. These purposes are most effectively achieved if annual leave is taken in the respective current year. However, the importance of such time for recuperation is not necessarily lost if taken at a later time, The Luxembourg judges concluded, however, that the recuperation time must be taken advantage of within a certain limited period since annual leave ceases to have a positive effect at a certain point.

As regards the length of the carryover period, the ECJ considered two aspects to be of decisive importance. In the interest of employees, any carryover period must be substantially longer than the reference period for the corresponding paid leave. In addition, employers must be

able to rely on protection against the possibility that accrued leave will enable employees to remain absent for excessively long periods of time and the organizational difficulties this can entail. Given the above, the court considered that a carryover period of 15 months, as in the case at issue, could represent a reasonable period that does not defeat the purpose of paid annual leave since it ensures that the right to such leave retains its positive effect as a period of rest for the respective employees.

CONCLUSIONS

The ECJ once again addressed the extremely divisive issue of entitlement to annual leave following prolonged illness. After the Federal Labor Court recently ruled that, as in the case of annual leave that accrues at the beginning of each year, the right to annual leave from previous periods expires in the case of prolonged illness (judgment of 9 August 2011, 9 AZR 425/10), the ECJ provided welcome clarity with its decision to the effect that the right to receive payment in lieu of annual leave may be limited and that a period of 15 months would adequately take into account the interests of both employers and employees. This judgment provides a clearly defined period for designing employment contracts and collective agreements for reference in actual practice. For obvious reasons, the court did not address the question as to whether a narrower limit (e.g., twelve months) would be possible. Given the signal effect associated with the judgment, insistence upon a shorter period would be ill-advised.

IV. TAKING INTO ACCOUNT TEMPORARY EMPLOYEES IN THE DETERMINATION OF THRESHOLD VALUES IN THE CASE OF OPERATIONAL CHANGES

According to the first sentence of section 111 of the Works Constitution Act (*Betriebsverfassungsgesetz – BetrVG*), a company with a workforce of more than 20 employees must consult its works council in the event that any major operational change is contemplated. In such situations, only actual employees are taken into account, i.e., not independent contractors or managerial personnel. However, some question existed as to whether temporary personnel should also be taken into account although they are not actually employees according to the case law of the Federal Labor Court.

The Federal Labor Court resolved this issue with its judgment of 18 October 2011 (1 AZR 335/10), which involved a case in which an employer who normally had a workforce of 20 employees also had one temporary employee as of November 2008. When the employer

dismissed a total of 11 employees in late May 2009 and refused to enter into negotiations with the works council concerning a reconciliation of interests, the plaintiff, who was dismissed as a result of this operational change, demanded compensation for disadvantages suffered pursuant to section 113 of the Works Constitution Act. The Federal Labor Court agreed with the plaintiff's contention that the employer as a rule employed more than 20 employees eligible to vote to the works council election at the time of the operational change in late May 2009, i.e., 20 regular employees and one temporary worker. The court found that the temporary employee must also be counted for the purposes of determining the size of the company, for such temporary personnel who have been with a company longer than three months must be taken into account for the purposes of determination of the threshold although they are not party to an employment relationship with that company.

CONCLUSIONS

The decision of the Federal Labor Court may have far-reaching consequences. Even if an employer's core workforce does not in itself exceed the threshold pursuant to section 111 of the Works Constitution Act, the employer must also count temporary personnel that have been with the company longer than three months for the purposes of determination of the size of the workforce. As a result, an employer is subject to the financial consequences called for by section 113 of the Works Constitution Act if he refuses to negotiate a reconciliation of interests with the works council in such a case.

V. INTERNAL NEWS: NEW PARTNER JOINS COLOGNE OFFICE

We would also like to take this opportunity to welcome Dr. Andreas Imping, who joined the employment law practice team of our Cologne office as of 1 November 2011.

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