

Avoidance of possible damage claims for expired holidays

Granting holidays prior to the end of the year is worth considering

The German Federal Labour Court (Bundesarbeitsgericht- BAG) will decide on December 13, 2016 whether employees may claim for damages for vacation days not taken in the previous year, even if a request for the grant of vacation has not been submitted.

According to sec. 7 para. 3 of the German Act on Vacation Entitlement (Bundesurlaubsgesetz – BUrlG), vacation must be granted and used within the current calendar year. Only in exceptional cases, the vacation entitlement may be transferred to March 31 of the following calendar year.

The BAG has constantly ruled that an employee – in an ongoing employment relationship – may not claim for damages for untaken and therefore forfeited vacation days of the precedent calendar year, if a respective request has not previously been submitted.

In comparison, the Regional Labour Courts (Landesarbeitsgerichte – LAG) of Berlin-Brandenburg (21 Sa 221/ 14), Munich (Case 8 Sa 982/ 14) and Cologne (4 Sa 1095/15) have recently decided that the employer is obliged to proactively fulfill the vacation entitlement. In case of non-compliance with this obligation, the employee may claim for damages; the employer would owe restitution in kind, thus vacation days. Consequently, the original vacation entitlement is substituted again by a vacation entitlement in the ongoing employment relationship. If the employment relationship has already ended, the claim for damages would result in cash payment.

This opinion according to which an employer has to instruct the employee to take vacation proactively is based on the grounds that the vacation entitlement serves the purpose of health protection and, thus, the purpose of occupational safety. As to occupational safety aspects, the employer needs to fulfill the obligations regarding the health protection without a prior request.

An appeal has been lodged with the BAG against the judgement of the LAG of Munich. The BAG will decide on December 13, 2016 in this case, whereby it is currently unknown whether the BAG will alter its jurisprudence. If this should be the case, owing to the Christmas period and the end of the year, there will be hardly enough time for the employers to act adequately.

Practical Advice

Due to the legal uncertainty, it seems appropriate to consider using the remaining time until the end of the year and requesting the employees in due time to take their vacation days or to proactively instruct the employee to take vacation, if individual employment contracts do not provide for a longer expiry period. Against the background of potential increases of the provisions for untaken vacation days in the balance sheets still due on the reporting date (December 31, 2016) a grant of holidays is worth considering.

Under no circumstances should any agreements on vacation compensations be made in ongoing employment relationships: The vacation entitlement of the employee does not lapse despite such agreement. The employee might therefore again demand for the (already) disbursed holidays.

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