WIRLITSCH
KANZLEI FÜR ARBEITSRECHT

NEWSLETTER LABOR LAW

July 2024 | 5th edition

TOPICS

Dear readers interested in employment law,

I am pleased to present you the new issue of the NEWSLETTER LABBOR LAW. In a constantly changing world of work, it is essential to keep up to date. This issue of the NEWSLETTER LABOR LAW is therefore dedicated to the Basic Law and will show examples of its manifold influence on labor law.

Here you will find the latest employment law information on topics such as

- the importance of fundamental rights in employment law, including freedom of expression, freedom of association and other topics
- Confidentiality clause in the employment contract
- Current ruling: Participation in the "Potsdam meeting" does not justify extraordinary dismissal
- New: 4th edition of our "Handbuch Dienstvereinbarung" now available to order!

We hope that you find the articles not only informative but also inspiring and that they provide you with valuable insights for your daily work. We look forward to your feedback and suggestions.

Yours sincerely

Michael D. Wirlitsch

JOUR FIXE LABOR LAW

Are you interested in discussing labor law topics in a small group? Then our jour fixe is just right for you!

We deal with all kinds of employment law topics or topics you wish to discuss at our jour fixe. The jour fixe takes place every three months at the end of the month.

In addition, we always discuss the latest case law on a wide range of topics.

- Working time law
- Works constitution law
- Staff representation law
- Disability law
- Civil service law...

The next jour fixe dates:

Fundamental rights and labor law

- 24.07.2024 at 18.00 Uhr in Freiburg,
- 25.07.2024 at 19.00 Uhr in Singen,
- 26.07.2024 at 19.00 Uhr via Zoom

https://us02web.zoom.us/j/85756981967?pwd=UxeEh7tOMJV1rB2maL4GfGJC46aowV.1

You will receive all further information about the event location with our special invitation to the jour fixe or at

wirlitsch-arbeitsrecht.de

TRAININGS LABOR LAW

The next training courses at a glance:

25. / 26.09.2024

Jugend- und Auszubildendenvertretung Teil III

09. / 10.10.2024

Rechte und Pflichten der Personalvertretung Teil I

15. bis 17.10.2024

Arbeitsrecht für Interessensvertreter Teil III

All further information on the training courses can be found at

afb-bodensee.de

The Basic Law and its influence on labor law

On May 23, 2024, we celebrated the 75th anniversary of the Basic Law. Based on the protection of human dignity and the catalog of fundamental rights, the Basic Law lays down the rules of democracy and state organization.

This issue of the NEWSLETTER LABOR LAW is therefore dedicated to the Basic Law and will show examples of its manifold influence on labor law.

The Basic Law (Grundgesetz, GG) first came into force when it was promulgated in Bonn on May 23, 1949 as a "provisional constitution" for the West German part of the country, the old Federal Republic of Germany. The Basic Law forms the legal basis of the Federal Republic of Germany and therefore also has a considerable influence on employment law. The fundamental rights and principles enshrined in it also shape - among other things - the organization of labour relations between employees and employers and provide a framework for legislation and case law in this area.

The importance of fundamental rights in labor law

The fundamental rights set out in the first part of the Basic Law are of central importance for employment law.

Freedom to choose an occupation

Article 12 (1) of the Basic Law guarantees freedom of occupation, i.e. the right to freely choose and exercise one's profession. This includes both the free choice of workplace and the free choice of employer. Article 12 (2) and (3) of the Basic Law also contains the prohibition of forced and compulsory labor.

Freedom of association

Freedom of association (Article 9 (3) of the Basic Law) includes the right to form associations for the protection and promotion of working and economic conditions. It therefore protects the right of employees to form trade unions, for example, in order to represent their interests, as well as the right of employers to form employers' associations. Both positive and negative freedom of association are protected, i.e. no one can be forced to join a corresponding association.

Freedom of association also forms the basis for the right to conclude collective agreements and wage labor disputes.

Welfare state principle

Article 20 para. 1 of the Basic Law contains the principle of the welfare state. According to this principle, the state must shape social conditions in such a way that every person can live in dignity and freedom. In labour law, for example, this is concretized in the right to fair pay (Minimum Wage Act) and the right to occupational health and safety (e.g. Working Hours Act).

In summary, it can be said that the Basic Law has a significant influence on labor law in Germany. The fundamental rights and principles enshrined in it form the basis for a fair and balanced employment relationship between employees and employers.

Confidentiality clause in the employment conract

In Germany, as in every society, there are taboos. Talking about your own salary is often considered impolite in Germany. Questions about other people's salaries are also considered inappropriate.

This social taboo is often reinforced in employment contracts in the form of a confidentiality clause.

Case study:

M. Fischer's employment contract contains the following clause:

"The employee undertakes to treat the amount of remuneration confidentially, in the interests of industrial peace also towards other company employees."

Mr. Fischer chats with his colleagues about his salary.

Does Mr. Fischer have to fear legal consequences due to a possible breach of duty based on this confidentiality clause?

Whether this is the case depends on whether confidentiality clauses regarding remuneration are permitted in employment contracts.

First of all, the principle of private autonomy applies in contracts, and corresponding agreements can be made by contractual agreement.

Freedom of association

Article 9 III GG protects the right of employees to join together in trade unions and works councils in order to represent their interests. The ban on salary discussions can impair employees' ability to organize effectively and stand up for their rights.

Principle of equal treatment:

Employees have a right to know whether they are being paid fairly for work of equal value. The prohibition on discussing salaries can lead to employees being unlawfully disadvantaged as they have no opportunity to compare their salaries.

A legal stipulation of the Equal Treatment Act can also be found in §§ 1ff. AGG, according to which, pursuant to Section 2 I No. 2, discrimination on the grounds specified in Section 1 AGG with regard to pay is inadmissible and in Section 75 I BetrVG, as well as since 2017 in the provisions of the Pay Transparency Act (e.g. gender pay gap).

Conclusion:

Due to the freedom of association and the principle of equal treatment, Mr. Fischer does not have to fear dismissal or any other legal consequence.

At the same time, he is not obliged to disclose his salary. Clauses such as those in Mr. Fischer's employment contract are invalid under Section 307 (1) sentence 1 BGB.

A look at Sweden:

In Sweden, it is possible for anyone to obtain information from the tax authorities about the taxed income of any **other Swede - with one exception:**

only the King remains secret!

Clothes make the man! – What can the boss tell me to do?

In principle, the employer has the right to issue instructions to its employees regarding the manner in which their work is to be carried out. This can also apply to clothing.

Good to know:

The right to issue instructions, also known as the right to issue directives, has its legal origins in Section 106 of the German Trade Regulation Act (GewO) and states that employers have the right to issue instructions regarding the content, place and time of work performance at their reasonable discretion.

However, the employer may not arbitrarily issue dress codes. They must have a legitimate interest in doing so.

Legitimate interests of the employer can be, for example

- **Protection of employees:** in some professions, e.g. construction or chemical industry, certain protective clothing is required for safety reasons.
- **Hygiene:** In industries where food is produced, it may be necessary for hygienic reasons.
- **Representation:** In some companies, it may be important for image reasons.

The employer's right to issue instructions and its legality is opposed to the employee's general right of personality under Article 2 (1) of the German Constitution.

How far does the right to issue instructions go?

As is so often the case, it depends on the individual case:

Can the employer prescribe the employee's underwear?

The employer may prescribe the color of the underwear if otherwise a uniform appearance is not guaranteed or the clothing is too sexy. For example, if an employee is wearing a red or black bra that is clearly visible under a white T-shirt, the employer can demand that only white or skin-colored underwear is worn (see case reference 3 TaBV 15/10).

Red or black work trousers?

The latest decision on the subject of the dress code concerns a fitter who lost his job after he repeatedly defied the company's house rules by wearing black work trousers instead of red ones. He had always worn the red work trousers in previous years.

After he continued to wear black trousers to work despite requests to the contrary and two warnings, the employer gave the fitter ordinary notice of termination. Both the Solingen Labor Court (case reference: 1 Ca 1749/23) and the Düsseldorf Higher Labor Court (case reference: 3 Sa 224/24), which was called upon to hear the appeal, were of the opinion that the employer's interests prevailed in this case and considered the dismissal to be lawful.

The judges of both instances cited occupational safety and corporate identity as reasons. The fitter's job included working with chop saws and cordless drills and therefore required special safety precautions. In addition, the color red was to ensure the visibility of the employees in the production hall in order to avoid possible accidents with the forklift trucks operating there. A uniform appearance of the company was also an important factor in maintaining the corporate identity.

The plaintiff could not provide any reasons other than his aesthetic perception to support his interests. In particular, since he had previously worn the red work trousers for years without complaint, the plaintiff's aesthetic perception was not sufficient to justify a rejection of the red work trousers.

According to the courts, the instruction to wear red trousers at work did not disproportionately infringe the employees' self-determination and did not interfere with their privacy. The right to issue instructions was therefore exercised within the permissible framework and the balance of interests was not in the plaintiff's favor.

Conclusion:

The employer may prescribe the clothing of its employees if it has a legitimate interest in doing so and the dress code is appropriate.

However, it is important that the dress code is set out in a company agreement or work regulations and that it does not unreasonably interfere with the personal freedom of employees.

Freedom of expression in the workplace

Permissible expression of opinion or breach of duty in the employment relationship

Art. 5 para. 1 sentence 1 of the Basic Law stipulates that everyone has the right to freely express and disseminate their opinions in speech, writing and pictures and to obtain information from generally accessible sources without hindrance. The limits to freedom of expression can be found in the provisions of general laws, for example the protection of minors and personal honor.

The fine line between expressing an opinion and defamation

Disparaging statements that prove to be abusive criticism or formal insults, or that attack the human dignity of others, are not covered by freedom of expression. Although fundamental rights are actually defensive rights of citizens against the state, they also affect legal relationships between private individuals - for example employment relationships.

Duty of consideration in employment relationships?

There is a certain tension between freedom of expression and the employee's contractual obligation to take the employer's legitimate interests into consideration. The contractual duty of consideration (Section 241 (2) BGB) can restrict freedom of expression in the employment relationship.

"Pure bullying hell here"

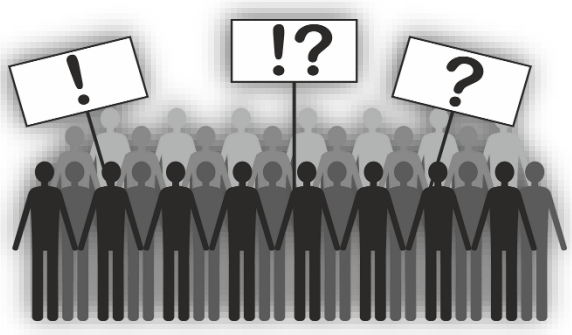
However, the employee can also invoke freedom of expression in the employment relationship if their statement is either only a value judgment ("pure bullying hell here"), or if **facts and opinions** are mixed and the statement is characterized by elements of opinion, ("no one can understand Mr. X's work assignments").

Disturbance of industrial peace

Employers often argue with the disturbance of industrial peace: if such a disturbance is caused by certain statements, this can justify dismissal in the event of repeated behavior. However, this must actually be disturbed. The mere aptitude to disrupt operations is not sufficient (LAG Nuremberg of January 13, 2004 - Ref. 6 Sa 128/03). There is a certain social tolerance. Hate and agitation, on the other hand, are not covered by freedom of opinion; the limit is drawn at defamation, insults, inhumane statements and criminal behavior.

Confidential statements between work colleagues

According to the established case law of the Federal Labor Court, defamatory statements about superiors or colleagues made by an employee in a confidential conversation between work colleagues fall within the scope of protection of the general right of personality under Art. 2 para. 1 GG in conjunction with Art. 1 para. 1 GG. Art. 1 para. 1 GG.



Expressions of opinion during leisure time are generally considered to be private and therefore free. However, exceptions apply if the statements are suitable for publicly disparaging the employer, as is conceivable in the case of negative statements on social networks, for example. If a reference to the employer is recognizable in the statement - e.g. because specific information is provided or because a video is shared in work clothing - this may also justify extraordinary dismissal, depending on the type of statement and other circumstances of the incident.

(see also p. 10 of the newsletter, Cologne Labor Court; extraordinary dismissal in the case of suspected right-wing extremist employees)

Age discrimination

Stereotypes and prejudices about people and discrimination based on their age are a widespread phenomenon that both younger and older people are exposed to in the labor market. Many older workers face age discrimination when looking for work, training and promotion opportunities or are forced into early retirement during economic downturns.

Stereotypes about older workers

Negative stereotypes about older workers:

- are less efficient, less motivated and not as productive as younger workers;

- are resistant to change, less adaptable and less flexible;

- are less capable of learning and therefore have less development potential;

- cost more as they are paid higher salaries;

- are increasingly less productive in terms of health and/or cognitive performance and are more often on sick leave.

Positive stereotypes about older workers:

- are more committed to the company and have fewer absences from work;

- are reliable, committed and motivated;

- have interpersonal skills and are good at employee development; are good mentors;

- are good leaders;

- can deal with change and have a broad knowledge of other sectors and areas.

Quelle: Smeaton, Parry 2018; Age positive 2001.

"DIGITAL NATIVE" CAUSES AGE DISCRIMINATION according to the Heilbronn Labor Court

The wording in a job advertisement "as a digital native, you feel at home in the world of social media, data-driven PR, moving images ..." indicates direct discrimination on the grounds of age. This is because a "digital native" is generally understood to be a person who has grown up with digital technologies and is practiced in their use. The reference to the younger generation predominates.

Arbeitsgericht Heilbronn, Urteil vom 18. Januar 2024 – 8 Ca 191/23

Breastfeeding for more than 1 year and MuSchG

If a child has been breastfed for 5 years, for example, does § 4 II MuSchG apply?

According to Section 4 (2) of the Maternity Protection Act (MuSchG), the employer must "grant the pregnant or breastfeeding woman an uninterrupted rest period of at least eleven hours after the end of the daily working time". It is not possible to shorten the rest period for pregnant and breastfeeding women.

According to the clear wording of § 4 Para. 2 MuSchG, § 4 Para. 2 MuSchG applies from the beginning of pregnancy until the end of breastfeeding. Consequently, according to the wording of the law, there is no rigid weekly, monthly or annual period with regard to the maximum duration of the applicability of § 4 Para. 2 MuSchG.

Interpretation of Section 4 (2) MuSchG

However, the application of a provision is not solely dependent on the wording. The intention of the legislator, the legal system and the meaning and purpose of a provision must also be taken into account. This could lead to the conclusion that Section 4 para. 2 MuSchG does not apply during the entire breastfeeding period, but only within a certain period after delivery - regardless of whether the employee concerned continues to breastfeed for longer.

In detail:

- **Systematics:**

Within the framework of several protective regulations, the MuSchG is based on a weekly or monthly period and not on the individual breastfeeding period - e.g. § 3 para. 2, 16 para. 2 MuSchG.

- **Meaning and purpose:**

With this regulation, the legislator intended to achieve a balance between the employer's duty of care as the employer and the right to protection of the mother and her child. The one-year period in Section 7 (2) MuSchG was justified by the fact that the benefits of breastfeeding would diminish as the child grew older. At the latest when the child is 12 months old, breastfeeding is no longer necessary from a nutritional or immunological point of view (BT-Drs. 18/8963, 62).

This argument can be transferred to the rest period. From this point of view, it would also appear appropriate in the context of Section 4 (2) MuSchG not to refer to the actual breastfeeding period, but to a specific period (e.g. one year) after the birth.

Further aspects

The employee's duty of loyalty and consideration towards the employer in accordance with §§241 Para. 2, 242 BGB also speaks in favor of a time-limited applicability of § 4 Para. 2 MuSchG. Therefore that the employee is also required to consider the employer's operational interests (Aligbe in: BeckOK Arbeitsschutzrecht, Winkelmüller /Felz/Hussing, §7 MuSchG para. 42,43).

Conclusion

Section 4 para. 2 MuSchG should also not be limited to the actual breastfeeding period (e.g. 5 or 6 years after delivery), but to one year after delivery.

Current judgment of Cologne Labor Court

Extraordinary dismissal of allegedly right-wing extremist employees

Participation in the "Potsdam meeting" does not justify extraordinary dismissal.

Cologne Labor Court: Participation of an employee in the so-called "Potsdam meeting" is not a reason for extraordinary dismissal.

Facts of the case

The 64-year-old plaintiff has been employed by the City of Cologne since 2000 and most recently worked as the central contact person for complaints management in the Environmental and Consumer Protection Office. On November 25, 2023, she took part in a meeting at the Villa Adlon in Potsdam, which was reported on nationwide. The City of Cologne took this as an opportunity to issue several extraordinary notices of termination to the plaintiff, who cannot be dismissed under the collective agreement. The city justified the dismissals on the grounds that the plaintiff had breached her duty of loyalty to her employer by attending the meeting with allegedly right-wing extremist participants and discussing plans to emigrate there.

Decision

The labor court ruled that participation in the meeting alone did not justify extraordinary dismissal in this specific case. There was no good cause. Due to her specific activity, the plaintiff was only subject to a so-called simple and not an increased political duty of loyalty. The degree of loyalty and allegiance to the public employer depends on the position and scope of duties of the employee concerned. Accordingly, an employee only owes such a degree of political loyalty that is indispensable for the proper performance of his work.

This simple duty of loyalty is only violated by behavior whose concrete effects are aimed at actively promoting or realizing anti-constitutional goals. Participation in the meeting alone does not justify the conclusion that the plaintiff was in internal agreement with the content of the contributions.

Review by Attorney Michael D. Wirlitsch

What an employee does in his or her free time is fundamentally his or her private matter and has nothing to do with the employer.

Article 5, Paragraph 1, Sentence 1 of the Basic Law regulates that everyone has the right to freely express and disseminate their opinions in speech, writing and images and to obtain unhindered information from generally accessible sources. Even if one considers the so-called Potsdam meeting to be politically wrong, the protection of freedom of expression also applies here.

The behavior only has consequences under labor law if the employment relationship is specifically affected by the behavior outside of work, which is not the case here. The plaintiff is active in general complaint management.

But for a public employee to be dismissed, it is also necessary that she actively pursues and advocates for anti-constitutional goals. Simply attending a meeting at which xenophobic statements are made is not enough.

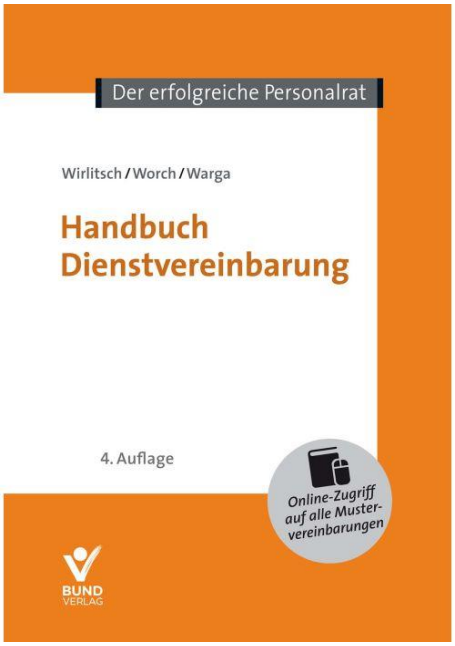
Conclusion:

The judgment of the Cologne Labor Court is convincing and correct.

THIS AND THAT

On your our behalf

“Service agreement manual”



We are pleased that our “Handbuch Dienstvereinbarung” has now been published in its 4th edition and can now be ordered from Bund-Verlag. It costs €49.00 and contains 700 pages.

The handbook offers comprehensive instructions on the design and practical formulation of legally compliant service agreements on numerous topics. It clearly explains the applicable legal and formal principles. A proven tool for staff councils, consultants, lawyers and also departments that have to design working conditions within the framework of service agreements. It appears at a time when the world of work, including public administration, is undergoing profound change.

It offers:

- In Part A, explanations on all important topics of the service agreement, many of which have been redrafted; They offer a reliable overview of service agreements and information on implementation.
- Part B contains sample service agreements with practical information on the respective topics for further processing, e.g. working time recording, whistleblower protection and home office, legalization of cannabis, etc.
- Online access to all sample texts
- Incorporation of the current BPersVG 202
- Cross-references to the federal state personnel representation laws and the BetrVG

NEWSLETTER LABOR LAW

We introduce ourselves

WIRLITSCH
KANZLEI FÜR ARBEITSRECHT

Our specialization is in:

LABOR LAW (individual and collective labor law)

We have been enforcing your rights in employment law for decades with a sense of proportion and perseverance, even in the face of considerable resistance in and out of court.

WORKS AND STAFF REPRESENTATION LAW

We represent works and staff councils, e.g. in the negotiation and enforcement of works and service agreements, restructuring and conciliation boards, etc.

INTERNATIONAL COMMERCIAL LAW

If you have questions regarding the cross-border deployment of employees, you will find that we are competent partners who will ensure that your arrangements are legally compliant.

KONSTANZ OFFICE
Bruder-Klaus-Str. 54
78467 Konstanz
Tel. +49 7531 1316-0

SINGEN OFFICE
Julius-Bührer-Str. 4
78224 Singen
Tel. +49 152 37605953

STUTTGART OFFICE
Königstr. 80
70173 Stuttgart
Tel. +49 711 222946-443

IN COOPERATION WITH

ArbeitsrechtsForum
Bodensee AFB GmbH

EDUCATION AND TRAINING

IN GERMAN AND EUROPEAN LABOR LAW

Your seminar provider for:

- Works councils and staff councils
- Youth and trainee representatives
- Representatives for severely disabled employees
- Employee representatives on supervisory boards
- Economic committees

You can register for the desired seminar at
www.afb-bodensee.de

If you have any questions, please contact us on Tel. 07531 1316-0 or by e-mail at info@afb-bodensee.de.