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Employment law – in brief ...

Law relating to standard business terms: Need for changes regarding preclusion clauses in standard employment contracts (statutory minimum wage/minimum remuneration pursuant to the Act on the Posting of Workers (*AEntG*))

In a current ruling (judgment of 24 August 2016 – 5 AZR 703/15, not yet published), the German Federal Labour Court declared a preclusion period clause invalid because it included a reference to the entitlement to minimum remuneration under the Act on the Posting of Workers (*AEntG*). It is still open whether the same applies to entitlements to the statutory minimum wage (German Minimum Wage Act (*MiLoG*)). If you wish to be on the safe side, you should review your standard employment contracts and make adjustments to the preclusion period were appropriate.

Employer Refused Continued Payment of Remuneration

The claimant was employed as a nursing assistant with an out-patient service provider. Nursing-care services employers have to pay a certain minimum remuneration (Second Regulation on Mandatory Working Conditions in the Nursing Care Sector (2. *PflegeArbbV*), § 8 (1) of the Act on the Posting of Workers (*AEntG*)). The employment contract contained a usual two-stage preclusion period commonly used in practice according to which all reciprocal claims arising from the employment relationship lapse unless they are asserted out of court (first stage) within three months after they become due and in court (second stage) in the event of denial or failure to reply within an additional three-month period.

The claimant had a doctor's certificate stating that she was incapable of working in the period from 19 November to 15 December 2013. The defendant was in doubts concerning the incapacity for work and discontinued payment of remuneration. Then, on 20 January 2014, the claimant asserted the statutory entitlement to continued payment of remuneration, first

in writing, but then not until 2 June 2014 in court. The defendant argued that the entitlement to continued payment of remuneration was covered by the preclusion clause and had lapsed because it had not been asserted in due time.

The Federal Employment Court and the lower courts ruled in favour of the claimant. They held that she was entitled to continued payment of remuneration in the case of sickness pursuant to § 3 (1) of the German Continuation of Remuneration Act (*EFZG*). In the opinion of the courts, the contractual preclusion clause was invalid because it also covered the entitlement to minimum remuneration pursuant to § 2 of the German Regulation on Mandatory Working Conditions in the Nursing Care Sector (*PflegeArbbV*).

Contractual Preclusion Clause and Minimum Remuneration

According to § 9 sentence 3 of the Act on the Posting of Workers (*AEntG*) – according to the German Federal Labour Court (*BAG*) – the preclusion periods applicable to the assertion of the entitlement to minimum remuneration may be regulated only in collective bargaining agreements, so the invalidity of the clause is already based on § 134 of the German Civil Code (*BGB*).

The peculiarity in the case under consideration is that it was not the entitlement to minimum remuneration, but the entitlement to continued payment of remuneration under the Act on Continued Payment of Remuneration (*EFZG*) that was asserted. The entitlement to continued payment of remuneration itself, however, does not constitute minimum remuneration under § 2 of the Regulation on Mandatory Working Conditions in the

Nursing Care Sector (*PflegeArbbV*) (according to the explicit statement of the lower court: Regional Labour Court of Lower Saxony, judgment of 17 September 2015 – 6 Sa 1328/14). Nevertheless, the Federal Employment Court and the lower courts came to the conclusion that the preclusion period may not apply also other entitlements – such as the statutory entitlement to continued payment of remuneration. This would be required by the need for a provision to be clear and comprehensible (§ 307 (1) sentence 2 of the Civil Code (*BGB*)). Upholding the clause in this context would also violate the prohibition of reduction of scope to preserve validity.

Contractual Preclusion Clause and Minimum Wage

The prevailing view for the scope of application of the Minimum Wage Act (*MiLoG*) was different to date. Under § 3 sentence 2 of the Minimum Wage Act (*MiLoG*), agreements are invalid in this respect when they provide for wages below the minimum wage or restrict or exclude the assertion of the entitlement to the minimum wage. Owing to the term "in this respect", this rule is supposed to be a case of reduction of scope to preserve validity that is regulated by law; clauses that do not make a distinction between the entitlement to the minimum wage and other entitlements are thus valid under the law relating to general terms and conditions. The opinion is also held, however, that such preclusion clauses are altogether invalid. The Federal Labour Court (*BAG*) has not yet clarified this issue.

Practical impact: preclusion periods in employment contracts should be amended

The decision of the Federal Labour Court (*BAG*) means in practice that at least the mandatory entitlements to minimum remuneration under the Act on the Posting of Workers (*AEntG*) must be explicitly excluded from the scope of application in the wording of preclusion periods. To be on the safe side, the limitation period agreed on in employment contracts should also not extend to entitlements to the statutory minimum wage. Although the recent judgment of the Federal Labour Court applied only to entitlements to minimum remuneration under the Regulation on Mandatory Working Conditions in the Nursing Sector (*PflegeArbbV*), surprises from Erfurt cannot be ruled out.

Moreover, only text form (and not written form - on paper and signed) is supposed to be required in preclusion and limitation clauses as of 1 October 2016 due to the revision of § 309 No 13 of the Civil Code that will come into force at that time (see Need for Change in Standard Employment Contracts as of 1 October).

Yours sincerely,

CMS Hasche Sigle
Practice Group Employment Law



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