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No automatic lapse of leave entitlement – What employers should pay attention to

Employment law – good to know ...

It often happens that employees do not claim their full leave entitlement during the current calendar year, be it due to an unexpected peak in demand at the end of the year or simply because they would prefer to take their leave in the following year. According to section 7 (3) sentence 1 German Federal Leave Entitlement Act (*Bundesurlaubsgesetz – BUrlG*), however, leave generally has to be granted and taken in the current calendar year. It may be carried over to the following year only if necessary for urgent reasons. The leave then definitely has to be taken by 31 March at the latest.

It has up to now been concluded from this that leave which is not granted and taken by the end of the year generally lapses. According to previous court rulings, this even applied to cases where the employee had unsuccessfully asked the employer to grant them leave in due course. However, under certain circumstances, employees were able to demand compensation from their employer if the leave really was not granted.

After a ground-breaking decision of the European Court of Justice (*Europäischer Gerichtshof – EuGH*) dated 6 November 2018 (case no. C-648/16), however, new obligations now apply to employers: They are now required to specifically and transparently ensure that employees are in fact able to fully take their annual leave by requesting that they do so – formally, if necessary. Therefore, employers must inform their employees clearly and in due course that their leave will be

lapsed at the end of the reference period or an extension period if they do not take it.

The German Federal Labour Court (*Bundesarbeitsgericht – BAG*) has now implemented these rulings with a current decision taken on 19 February 2019 (BAG, 19 February 2019 – 9 AZR 541/15). According to this, employees' entitlement to paid annual leave will cease at the end of the calendar year only if the employer has specifically informed them of their leave entitlement and lapse periods in advance, and requests that they take their leave, and the employees still do not take it of their own accord despite being able to. This follows from an interpretation of section 7 BUrlG in conformity with directives.

Practical tips for employers

If employers want to ensure that leave entitlement ceases at the end of the calendar year or the extension period in future, they must proactively approach their staff and tell them this. What requirements are specifically to be applied to this demand is not clear from the BAG's current press release. In this respect, it remains to be seen whether clear requirements will result from the grounds for the decision. It is currently only clear that employers are still not required to grant employees leave voluntarily.

Informing employees of the lapse of leave entitlement only in printed form, for example in their work contract,

is not likely to satisfy the employer's obligation to provide information, since a specific instruction is required according to court rulings.

When exactly and in what form the instruction should be given is also not clear from the press release. For the purposes of documentation and evidence, however, the instruction should at least be in text form and receipt confirmed by the employee. Furthermore, in terms of time, it may be sufficient for the instruction to be given such that all outstanding statutory leave entitlements can be taken before the end of the relevant reference period.

The question as to whether it is permissible to inform all employees concerned together (circular email, notice board etc.) cannot yet be conclusively determined from the press release. Therefore, for the time being, employers should inform their employees about their outstanding leave entitlement and request that they take their leave individually to be on the safe side.

It is currently still unclear what effects this decision has on leave entitlement that has supposedly already been lapsed, for example from 2018 (key term: protection of reliance on existing law). It could prove particularly problematic in this context that the decision of the EuGH dates from 6 November 2018 (case no. C-684/16) and employers therefore possibly had enough time according to the court ruling to instruct their employees about the new requirements accordingly.

Please do not hesitate to contact us if you have any questions on this matter or need any additional information.

Kind regards

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