European (& the GCC) Employment Law Update

Jurisdiction: Germany
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6 November 2018	*ECJ C-684/16 (Max-Planck-Gesellschaft/Tetsuji Shimizu) and C-619/16 (Kreuziger/Land Berlin)* *European Court of Justice ruled that an employee does not automatically lose their holiday entitlement at the end of a holiday year, if they do not apply for holiday.*	The European Court of Justice had to decide whether Article 7 of Directive 2003/88/EC conflicts with a national provision under which an employee automatically loses their holiday entitlement at the end of the calendar year if they do not apply for a holiday on their own initiative. In the opinion of the European Court of Justice, a national expiry provision which provides that leave expires at a certain point in time is in principle admissible and compatible with European Union Law. However, it is not compatible with Article 7 for an employee to automatically lose their holiday entitlement at the end of a holiday year because they did not apply for holiday on their own initiative. The forfeiture of leave is only justified if the employee has voluntarily and in full knowledge of the resulting consequences refrained from taking their paid annual leave after having been given the opportunity to actually utilise their holiday entitlement. The burden of proof for these conditions lies with the employer. In its subsequent decision of 19 February 2019 (9 AZR 541/15), the Federal Labour Court implemented the requirements of the Court of Justice of the European Union. The national regulation is to be interpreted in conformity with the Directive to the effect that holiday entitlement expires on 31 December of the holiday year, only if the employer has informed the employee clearly and in good time of the expiry of the holiday. Employers can therefore no longer rely on holiday entitlement expiring automatically on 31 December if an employee does not become active and does not apply for a holiday.

6 November 2018	*ECJ C-569/16 (Stadt Wuppertal/Maria Elisabeth Bauer) and C-570/16 (Volker Willmeroth Ek/Martina Broßonn)* *European Court of Justice ruled that holiday entitlement is heritable.*	The European Court of Justice had to decide whether holiday entitlement is heritable and therefore whether the heirs of deceased employees can demand financial compensation from the former employer in lieu of paid annual leave which the employee could not take before their death. According to the settled case law of the Federal Labour Court to date, holiday entitlements expire upon the death of the employee. That is because the purpose of the vacation – i.e. the recreation and recovery of the employee – can no longer be fulfilled after their death. Therefore the holiday entitlement is inseparably connected with the person of the employee. However, the European Court of Justice upheld its previous judgment from 12 June 2014 (C 118/13) that an employee's entitlement to paid annual leave does not cease upon their death and that the heirs can demand financial compensation for the leave not taken. In the event that national law excludes holiday pay in case of the death of the employee, the heirs of the deceased employee can directly invoke European Union law. This applies to both public and private employers. The European Court of Justice justified this by stating that the temporal aspect of recreation and recovery was only one of the two components of the right to paid annual leave. The holiday entitlement includes a claim to payment during the leave and to financial remuneration for the annual holiday not taken at the end of the employment relationship. The financial component is of a purely pecuniary nature and therefore capable of being transferred to the assets of the employee and their heirs.
19 March 2019	*9 AZR 315/17* *Federal Labour Court ruled that there is no entitlement to leave during special leave (sabbatical).*	The Federal Labour Court had to decide whether employees were entitled to (additional) paid leave for periods of agreed special leave (sabbatical). In the case at issue, an employer granted an employee unpaid special leave for approximately two years. After the end of the special leave, the employee claimed statutory minimum leave for the leave year in which he was on special leave. To date, the Federal Labour Court had assumed that leave was not a consideration for work performed, but was based solely on the existence of

		an employment relationship. Therefore employees had a right to statutory leave even for periods of special leave. The Federal Labour Court abandoned this previous case law and stated that there is no entitlement to leave for periods of unpaid special leave. That is because the parties to the employment contract have temporarily suspended their main performance obligations.
1 January 2019	*Act on Further Development of Part-Time Employment Law (Brückenteilzeitgesetz)* *The new law introduces an entitlement to part-time work on a temporary basis, coupled with an automatic return to the previous working time after a certain period of time (temporary part-time).*	The entitlement to temporary part-time work ("Brückenteilzeit") enables an employee to reduce their working time without cause or reason and to automatically return to their previous working hours after a predetermined period of one to five years (§ 9a TzBfG). The aim of the new regulation is to ensure that employees do not have to remain involuntarily in part-time work. Under the former part-time regulations, employees were only entitled to a permanent reduction in working hours ("indefinite part-time", § 8 TzBfG), combined with the right to an increase in working time. However, the entitlement to an increase in working hours only obliges the employer to give priority to part-time employees when filling vacant positions with equal suitability (§ 9 TzBfG). So far, there has been no unconditional entitlement to return to the previous working hours. The claim to temporary part-time work fills this legal gap and guarantees that the employee automatically returns to their previous working hours after the specified time. Employees now have a free choice between the regular indefinite part-time model and the temporary part-time model. All employees whose employment has lasted longer than six months are entitled to temporary part-time work on condition that the employer employs more than 45 employees on average. The period of reduction in working time must be at least one year and a maximum of five years. Apart from that, no cause or reason is required. In the view of the legislator, temporary part-time work should not only serve to enable employees to raise children, care for relatives and gain further training, but should also simply enable a smooth transition to retirement or a balanced relationship between work and private life.

		The employer can refuse a reduction in working hours for operational reasons. In addition, in companies with 45 to 200 employees, only one in 15 employees is entitled to temporary part-time work. Further applications may be rejected.
17 October 2018	*5 AZR 553/17* *Federal Labour Court ruled that necessary travel time must be remunerated in the same way as working time.*	The Federal Labour Court had to decide whether travel time to a foreign assignment is subject to remuneration. The employer assigned the employee to work on a construction site in China. At the employee's request, the employer booked a business flight instead of a direct economy flight, which could only be booked with a stopover in Dubai. Due to this "detour", the employee travelled for a total of four days. The employer remunerated these four days of travel with eight hours of working time per day. The employee demanded payment for another 37 hours, for the entire journey from his home to his arrival at the external workplace. In general, the Federal Labour Court considers claims to remuneration for travel time to be justified. The statutory duty to pay remuneration is linked to the performance of the promised services. This not only includes the actual working time, but any other activity required by the employer that is directly related to work performance. Work is therefore any activity which serves the fulfilment of an external need. In principle, the journey from an employee’s home to their job is not working time. An exception applies if the employee has to perform their work outside the company. In this case, travel to the external workplace is one of the main contractual obligations. This also includes travel that is necessary due to a temporary posting abroad which is carried out exclusively in the employer's interest and inseparably linked to the work owed. The court emphasises, however, that a remuneration obligation only exists for necessary travel times. When choosing the means of travel, an employee is obliged to choose the cheapest and fastest means of transport because of their obligation to take account of the travel costs. A direct flight in economy class would have been reasonable. The additional time incurred by the detour via Dubai was not necessary and therefore did not qualify for remuneration.