European (& the GCC) Employment Law Update

Jurisdiction: Germany
Date: October 2018

Impact date	Development	Impact
23 August 2018	*BAG – 2 AZR 133/18* Federal Labour Court ruled on the use of legitimate open video surveillance by the employer specifically in relation to timing.	The Federal Labour Court had to rule on a dismissal for theft. The defendant had installed visible closed circuit TV on the shop floor to protect his property against criminal offences by both customers and employees. The video recordings showed that the claimant had failed to put money into the cash register and the defendant terminated the employment relationship without notice. The claimant argued that the video recordings should not have been exploited as they violated his right to privacy. The Federal Labour Court ruled that processing and using the video recordings was legally permissible, pursuant to section 32(1) sentence 1 Federal Data Protection Act (BDSG) (old version) and, therefore, did not violate the employee's right to privacy, provided that the overt surveillance itself was legally permissible. The Court held that the defendant was not required to evaluate the video sequences immediately, but rather wait until there was a legitimate cause to do so. The Court also held that the provisions of the General Data Protection Regulations (GDPR) also do not rule out a judicial evaluation of the data collected.
25 April 2018	*BAG – 5 AZR 245/17* Federal Labour Court ruled on a payment obligation during time when an employee is changing his or her working clothes.	The Federal Labour Court had to decide whether the times when an employee was changing into or out of her working clothes are subject to a payment obligation. The defendant runs a transport company for money and valuables. The employment contract referred to a collective bargaining agreement, which provided that the employer must offer working clothes for free and that the employee must wear them. The collective agreement was silent as to whether there was a payment obligation for times when staff were changing their working clothes, though

		wearing work clothes during leisure time was only allowed with the prior permission of the employer. The work clothes had a large company logo on the front and back. According to previous case law, there was a payment obligation at least if the work clothes were particularly noticeable. This is the case where the employee is readily identifiable in a public space as an employee of the company, or can at least be assigned to a specific branch of the profession (e.g. white overalls for healthcare professions). The key factor is always whether or not the employee is acting only on behalf of the employers' interests. The Federal Labour Court confirmed that, due to the company logo on the front and back, the working clothes were particularly noticeable in this sense. In addition, given that the wearing of the service clothing was mandatory, the employer had to pay for the times when employees were changing into or out of work clothes. The question of an obligation to pay staff in such circumstances is entirely fact specific, though it is more likely to arise where the service clothing is particularly noticeable.
18 September 2018	*BAG – 9 AZR 162/18* Federal Labour Court ruled that a exclusion clause in a standard form employment contract is entirely unlawful if it excludes the right to the statutory minimum wage.	The claimant was employed as a floor fitter. The standard form employment contract provided that all claims arising from or related to the employment (including claims regarding services, salary, pay in lieu of vacation, detailed references, etc.) lapse if such claims are not asserted to the other party in written form within three months after the claim has become due. This clause did not exclude the right to the statutory minimum wage. After the employment relationship was terminated, the parties reached a settlement, but could not agree on claims for compensation for untaken holidays. The defendant maintained that these claims had lapsed because they had not been asserted within three months. Under section 3 sentence 1 of the German Minimum Wage Act, agreements that fall below the entitlement to the minimum wage, or limit or exclude the assertion of this entitlement, are invalid to that extent.

		The Federal Labour Court held that the exclusion clause did not differentiate between claims falling below and above the minimum wage. As a result, the clause was not clear and comprehensible and, therefore, invalid. Exclusion clauses in employment contracts must **not** include the statutory minimum wage, at least if they were concluded after 31 December 2014. Otherwise, the exclusion clause is entirely unlawful and the employee can pursue all those claims that should have been excluded by the clause. Employers with such clauses in their standard form employment contracts must ensure that they are amended.