

## Social Security Consequences of Irrevocable Leave of Absence - Recent Decision of the Federal Social Court (*BSG*)

### Introduction

The following situation is a familiar one: the employer settles a lawsuit with a terminated employee, agreeing that the employment agreement will terminate after expiration of a certain time period. In many cases, the parties also agree that the employee will be placed on an irrevocable leave of absence until the effective date of termination and that the employer is obligated to pay the employee's salary in accordance with the terms of the employment agreement until that date.

### Past Situation

Such an agreement on an irrevocable leave of absence however had far-reaching consequences under social security law. At a meeting on July 5/6, 2005, the umbrella organizations of the pension insurance carriers, health insurance carriers and Federal Agency for Employment took the view that in the event of an irrevocable leave of absence, employment requiring the payment of social security premiums ended on the last workday.

The consequence was that an employee on an irrevocable leave of absence were required to pay social security premiums only until the employee's last work day. Thereafter the employee fell into a "social security hole." This was also associated with disadvantages for the employer, because the employer, though no longer required to pay social security premiums, was liable to the employee if the employer failed to inform the employee of the aforementioned negative consequences of the termination agreement. In practice, employers therefore usually placed employees on revocable leave only, which appeared to serve the interests of both parties.

A revocable leave of absence however caused legal problems related to the settlement of vacation claims. A leave of absence can under German law be in settlement of remaining vacation claims only if the employee does not have to expect to be called back to work during that time period. Moreover, German law does not permit an automatic or implied settlement of vacation claims, but rather requires an express agreement to that effect. As a result, whenever vacation benefits were not expressly provided for when the parties agreed to a revocable leave of absence, employees were

generally able to demand additional payment for any remaining vacation days.

For the employer, this meant that the agreement providing for a leave of absence, even if intended to be generally revocable, had to provide for an irrevocable suspension at least for the length of any accrued or accruing vacation days, in performance of the employer's obligation to provide vacation benefits.

**Decision of the Federal  
Social Court dated September 24, 2008  
(B 12 KR 22/07 R)**

This issue was addressed in a recent decision of the Federal Social Court (*BSG*). At the present time, the decision is available to us only as a hearing report of the Federal Social Court (No. 47/08). Because of its great practical significance, we thought it appropriate however to inform you of this decision prior to publication of the full text.

The Federal Social Court ruled as follows:

The court clarified that the obligation to carry pension and unemployment insurance continues during an irrevocable leave of absence. While the court recognized that employment required a legal contract (e.g., an employment agreement) as well as performance of that contract, the court stated that in this particular instance "performance" did not require that work was actually performed under the employment agreement.

Thus, the agreed effective date of termination now coincides with the end of employment for social security purposes.

**Practical recommendation**

As a result of this new decision of the Federal Social Court, an agreement to place an employee on an irrevocable leave of absence until the effective date of termination no longer pose a risk that the employer may be required to inform the employee of the social security consequences or, worse yet, incur liability to the employee.

In practice, this means that an employer may now once again agree on an irrevocable leave of absence with an employee in settlement of any remaining vacation claims.

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