

European Work Hour Directive - Consequences for Vacation Benefits of Employees on Long-Term Sick Leave - New Decision by the European Court of Justice

Introduction

If an employee is on sick leave for a long time period -- possibly several years -- the question arises what happens to his accrued vacation benefits after he returns to work or when his employment terminates. In the past, German law, as established by a consistent line of Federal Labor Court decisions, was clear in such cases: vacation benefits are limited to the calendar year in which they accrue or, provided that the requirements for rolling over vacation benefits are satisfied, to March 31 of the following year. If vacation benefits are not used, they are forfeited without compensation. The employee generally also has no right to be compensated in cash for accrued vacation benefits in such cases. In the past, this applied even if an employee was sick and unable to work until the end of the rollover period and thus had no opportunity to take a vacation.

Such a scenario was at issue in a recent case before the Regional Labor Court of Düsseldorf. The court in that case expressed doubts that the past practice in Germany was reconcilable with European law and referred the issue to the European Court of Justice.

Submission order of the Regional Labor Court of Düsseldorf dated August 2, 2006 (case no. 12 Sa 486/06)

The facts in the case before the Regional Labor Court of Düsseldorf were as follows: In the years 2004 and 2005, the plaintiff had been continuously sick and unable to work for a total of almost 13 months. His employment agreement was finally terminated early on September 30, 2005, because the plaintiff had been granted unlimited public pension benefits on the basis of his reduced earning capacity. The plaintiff never regained his ability to work even after his employment had ended. Following termination of his employment, the employee demanded financial compensation for his accrued vacation benefits from the years 2004 and 2005. The employer refused payment, arguing that the plaintiff had forfeited his vacation benefits at the end of the respective rollover period as a result of his persistent sickness.

The Labor Court of Düsseldorf had dismissed the complaint. On appeal, the Regional Labor Court of Düsseldorf stayed the proceeding and submitted it to the European Court of Justice requesting, *inter alia*, a ruling on whether it is reconcilable with the European Work Hour Directive that vacation benefits are forfeited even if an employee is sick and unable to work until the end of the rollover period and thus is unable to take vacations.

The decision of the European Court of Justice dated January 20, 2009 (case no. C-350/06)

The European Court of Justice confirmed the doubts expressed by the Regional Labor Court of Düsseldorf and held that the past practice in Germany was in violation of European law.

While it is in the view of the European Court of Justice generally permitted for national laws, such as the German Federal Vacation Benefits Act, to provide that vacation benefits must be used by a certain deadline, such a deadline may not have the result that

vacation benefits are forfeited even in scenarios in which it is simply impossible for an employee to actually take vacations as a result of disability. In the opinion of the European Court of Justice, forfeiture in such cases is reconcilable neither with the purpose of vacation benefits nor with the significance of the statutory provisions on vacation benefits to European law. As a result, when employees are on long-term sick leave, vacation benefits are, if sickness persists, not forfeited at the end of the rollover period as in the past, but rather must be granted if the employee returns to work or must be compensated in cash if employment is terminated.

Follow-up questions

- Does the decision of the European Court of Justice only apply to the minimum annual paid vacation of four weeks guaranteed by the Work Hour Directive or also to additional vacation benefits provided for in collective bargaining agreements or the employee's employment agreement?
- Which consequences does this decision have for related scenarios, such as provisions reducing vacation benefits in the event of parental leave or service in the German Armed Forces?

The decision expected to be rendered by the Regional Labor Court of Düsseldorf in the original case discussed above may already shed some light on these issues.

Practical advice

The decision of the European Court of Justice clearly contradicts past case law of the Federal Labor Court, which will not be able to stand in the future. In the future, if an employee on long-term sick leave returns to work, accrued vacation benefits, which may in some cases be substantial, must be granted if the employee returns to work or must be compensated in cash if employment is terminated. The additional costs incurred by the employer as a result could be quite substantial.

In our opinion, however, the flipside of the change in law is that the additional costs resulting for the employer may benefit employers in situations where employment is terminated on grounds of sickness: In cases where employment is terminated because of an employee's long-term sickness, the financial burden resulting for the employer was in the past -- other than in cases where employment is terminated on the basis of frequent short-term sicknesses - of little relevance, because the financial burden was generally limited to the continued payment of the employee's salary for a time period of six weeks (which is "reasonable" by law). In the future, employers could assert -- at least as a back-up argument to support a termination in court -- that "accumulating" vacation benefits would steadily increase the employer's financial burden over the course of time. It remains to be seen how much weight, if any, German labor courts will assign to this argument.

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