Short-time Work Update – Liability risks if short-time work is not validly introduced by a works agreement

INTRODUCTION

Short-time work remains a major issue even in 2021. In light of the global pandemic and the restrictions this entails, the introduction of short-time work to preserve jobs is a decisive issue for employers and employees alike. However, the valid introduction of short-time work harbors several pitfalls. This was already made evident by a decision of the Federal Labor Court on November 18, 2015 (5 AZR 491/14). Under that ruling, a works agreement for the introduction of short-time work must regulate, **at a minimum**, the start and duration of short-time work, the status and distribution of working time, and the selection of the employees affected by short-time work. During the pandemic and the often-changing parameters it necessitates, these requirements have presented employees and works councils with major challenges, as is also shown by the recently published decision of the Labor Court of Kiel of March 30, 2021 (3 Ca 1779 e/20).

DECISION OF THE LABOR COURT OF KIEL (JUDGMENT OF MARCH 30, 2021 – FILE NO. 3 CA 1779 E/20)

In this litigation, an employee claims that the reduction of his annual vacation because of short-time work is unlawful. His employer and the works council had entered into a works agreement on the introduction of short-time work. Instead of regulating in detail the selection of the employees affected by this, the scope of the reduction in work hours and the allocation to certain days of the week, the works agreement provided that the employer would present attachments with the details which would then be decided on by the works council. The attachments were each signed separately by the parties to the works agreement, and a list, according to which the introduction of short-time work for the individual employees could be seen, was then attached to each of them in schedule. The parties to the agreements did not, however, sign these lists, nor were the lists made public in the company, because of privacy considerations, or made available to the individual employees in writing.

The labor court objected to the failure to make the list public in the company, as it was not at all clear to the employees affected by short-time work whether their working time had been reduced by the agreements or not. Furthermore, it was not sufficient that employees could have checked the attachments at any time in the office of the works council because no advice to this effect had been included in the works agreement. To such extent, the short-time work had not been validly introduced for the plaintiff. Aside from this, there were no indications that there had been an at least implied mutual agreement with the employee on the introduction of short-time work. A reduction of the claim to vacation days was thus invalid in the view of the labor court.

CONSEQUENCES OF THE RULING FOR PRACTITIONERS

The decision has not yet become final and there is hope that the higher instances will be more circumspect. The parties to the works agreement obviously took pains to reconcile the strict requirements of the Federal Labor Court and the practical needs brought on by the pandemic. Also, data protection concerns should be taken into account, as the relationship between the statutory duty to display works agreements and the restrictive requirements of the GDPR remains largely unanswered.

Should the view of the Labor Court of Kiel prevail, many employers who have tried, together with their works councils, to find as pragmatic a model as possible for the complex introduction of short-time work under the given situation will be subject to major risks. These are not limited to the invalid reduction of vacation days but could also result in the **retroactive payment of invalidly reduced compensation** or the **reimbursement of the short-time work benefits** received from the Employment Agency because of the invalid introduction of short-time work.

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