

NEW EMPLOYER OBLIGATIONS TO ENSURE FORFEITURE OF UNUSED VACATION ENTITLEMENTS IN GERMANY

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Germany/Global Employment Law Alert

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SUMMARY

In *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu (C-684/16)*, the European Court of Justice (the ECJ) decided that the provisions of the EU Working Time Directive (the Directive) and the Charter of Fundamental Rights of the European Union (the Charter) on minimum vacation entitlements allow for an automatic forfeiture of vacation entitlements in limited cases only. Especially, consideration needs to be given to whether employees have been put in a sufficient position by the employer to actually make use of their vacation entitlements. The ECJ has noted in its decision that this may require that employers appropriately educate their employees on the potential forfeiture of vacation entitlements.

The German Federal Employment Court (the BAG) has recently specified the obligations which apply for employers in Germany based on this ECJ decision. Employers should therefore carefully ensure immediate compliance with these obligations in order to ensure that employees' unused vacation entitlements can be forfeited. Generally, this will require providing employees in Germany with individualised annual vacation notifications. Noncompliance with the obligations can result in employees being able to claim vacation entitlements even years after these had supposedly forfeited.

We expect that employees in Germany will increasingly raise additional vacation claims especially in the context of termination of employment and request additional financial compensation for (unused) vacation entitlements. Employers who have not ensured compliance with these newly developed obligations will therefore face the risk of additional costs.

BACKGROUND

In accordance with the German Federal Vacation Act (the Vacation Act), unused vacation entitlements of employees are generally forfeited at the end of each calendar year. There are only limited exceptions which allow employees to carry over unused vacation entitlements into the first three months of the subsequent year. Longer carry over periods can apply in very limited circumstances only. In addition, the Vacation Act generally provides for financial compensation for unused vacation entitlements upon termination of employment (provided that such entitlements have not already forfeited).

It should be noted that the Vacation Act is mandatory only as far as the minimum statutory vacation entitlements are concerned (four weeks per year). Different rules can be agreed for additional vacation entitlements which exceed this statutory minimum. If no deviating rules are agreed, all vacation entitlements are fully subject to the rules of the Vacation Act.

The Vacation Act does not expressly impose any obligation on the employer to notify its employees about their vacation entitlements or the potential forfeiture of unused vacation entitlements. Rather, similar to many jurisdictions around the world, the Vacation Act generally follows a concept of "use it or lose it". However, based on the doctrines developed by the ECJ and the BAG, the former fairly standard German "use it or lose it" concept has been significantly modified in order to avoid a violation of the Directive and the Charter.

NEW OBLIGATIONS FOR EMPLOYERS IN GERMANY

The BAG now requires employers to ensure "concretely" and "with complete transparency" that employees are actually able to take their vacation entitlements. Employers therefore need to ask (formally, if necessary) their employees to make use of their vacation entitlements. Further, employers have to educate their employees clearly and in good time about the circumstances under which unused vacation entitlements will be forfeited. It will be necessary in this context to specify the employees' individual vacation entitlements and their potential forfeiture for each year.

In accordance with these obligations, employers will need to ensure that they do not create a situation in which employees might be prevented from taking their vacation. Whether or not employers have done everything necessary in order to comply with these obligations will be determined on a case-by-case basis. Employers will bear the burden of proof in this regard as the potential forfeiture of vacation entitlements constitutes a positive legal consequence for them.

Abstract information, for example in employment agreements, leaflets or collective agreements, will generally not meet the requirements of "concrete and transparent information". Rather, by way of example, employers could provide annual notifications for each employee:

- outlining the individual vacation entitlement;
- requesting that the employee actually takes these entitlements; and
- educating the employee about the potential forfeiture of untaken entitlements.

With such annual notifications in place, employees who nevertheless do not make full use of their vacation entitlements will generally be considered to have done so freely and in full knowledge of the consequences. Therefore, only in such cases of "concrete and transparent information" will the vacation forfeiture rules under the Vacation Act apply.

Similar obligations will apply for vacation entitlements from preceding years and for vacation entitlements which can be carried over to subsequent years.

RECOMMENDED ACTION FOR GERMANY

Employers with employees in Germany should—as soon as possible—set up a process to ensure that their employees are sufficiently notified about vacation entitlements and the potential forfeiture. Further, employees should also be asked (formally, if necessary) to actually make use of their vacation entitlements.

Employers will also need to ensure that, following the implementation of such processes, there still is sufficient time for the employees to actually make use of their vacation entitlements. Implementing such a process only at year end will likely not be sufficient for that year.

Going forward, vacation notifications should become an annual routine for employers with employees in Germany. It is likely to be possible to largely standardise such a notification process. However, there may remain a limited need to separately deal with specific cases, e.g. where carry over exceptions or additional statutory vacation entitlements apply.

Further, employers should ensure that they will be able to prove that they have notified their employees accordingly. For example, an employer could request individual acknowledgements of receipts from its employees or include the notifications in other documented annual policy acknowledgement procedures.

IMPLICATIONS IN OTHER EU MEMBER STATES

The obligations outlined by the BAG directly apply only for employment relationships which are subject to German law. However, the overarching principles highlighted by the ECJ affect all EU Member States. Other EU Member States, such as Italy, follow similar laws as Germany when it comes to the forfeiture and compensation of vacation entitlements. Therefore, similar obligations could potentially be imposed on employers in such other EU Member States as well. It will remain to be seen if and how local employment courts in such other EU Member States pick up the ECJ's decision and whether they will develop similar obligations for employers in their countries.

For now, all employers with employees throughout the EU should continue to monitor the situation for EU Member States other than Germany. Further, employers who are required to roll out vacation notifications for Germany may want to consider taking a cautious approach of rolling out such notifications for their employees in other EU Member States as well.

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