

Contractual forfeiture clauses have to exclude the minimum wage

On September 18th, 2018, the Federal Labour Court (*Bundesarbeitsgericht – BAG*) ruled (9 AZR 162/18) that a forfeiture clause (*Verfallklausel*) in an employment contract is invalid in the context of a general terms and conditions review (*AGB-Kontrolle*) if it does not exclude the statutory minimum wage (currently 8,84 EUR per hour) guaranteed by sec. 1 Minimum Wage Act (*Mindestlohngesetz – MiLoG*) from expiration. Such a clause preformulated by the employer is not compatible with the transparency requirement of sec. 307 subsec. 1 sent. 2 German Civil Code (*Bürgerliches Gesetzbuch – BGB*). A forfeiture clause must therefore distinguish between the minimum wage entitlement and other entitlements. Since the Minimum Wage Act has been in force since January 1st, 2015, only employment contracts signed after December 31st, 2014, are affected.

The parties signed an employment contract on September 1st, 2015. The contract stated that any claims arising from the employment relationship lapse if they are not asserted within three months of the due date (forfeiture clause). Following a court settlement during the termination litigation, the employer submitted a payroll statement which, however, did not show any additional leave compensation. In the proceedings, the employer referred to the fact that the employee is not entitled to any leave compensation as he did not assert the related claim within the period of three months. The Labour Court (*Arbeitsgericht*) decided in favour of the employee. In the employer's appeal to the State Labour Court (*Landesarbeitsgericht*), the claim was dismissed. The final appeal of the employee before the Federal Labour Court was again successful for the employee. The judges decided that the employee is entitled to leave compensation because he was not obliged to assert the claim within the contractual deadline. The forfeiture clause violates sec. 307 subsec. 1 sent. 2 German Civil Code because it does not exclude the minimum wage claim from expiration and is therefore not clear and understandable for the employee. As a consequence, the whole clause is considered being invalid.

Forfeiture clauses can be found in the majority of German employment contracts. A considerable part of such clauses will now be ineffective with this judgement. For employers, this means that all forfeiture clauses in employment contracts signed after December 31st, 2014, should be reviewed. If it turns out that a forfeiture clause is invalid for the reasons stated above, this applies not only to minimum wage entitlements but to the entire clause. Instead the statutory legal provisions on the limitation of claims apply. In general, claims therefore expire after three years, whereas employment contract forfeiture clauses usually specify three months as a deadline for asserting claims. Thus, it is recommendable to check and improve the relevant clauses soon.

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