VAA-Information

LAW ON PAID ANNUAL LEAVE

VAA *Verband Angestellter Akademiker (Association of Employed Academics and Executives in the Chemical Industry)*

SUMMARY

As of: August 2019

DEFINITION

Paid annual leave (Urlaub) is defined in labour law as vacation, namely as a period of rest with continued pay aimed at letting the employee decide on the way in which he/she wishes to spend this annual leave (cf. the German Federal Labour Court, BAG 20 June 2000 – 9 AZR 405/99). A statutory entitlement to minimum paid annual leave is set down in the German Federal Paid Annual Leave Act (Bundesurlaubsgesetz, BUrlG).

ENTITLEMENT TO PAID ANNUAL LEAVE (URLAUBSANSPRUCH)

This statutory entitlement to paid annual leave has its legal basis in the BUrlG. Special regulations are also set down in the employment agreement, in works agreements or in collective agreements.

The statutory provisions are mandatory in terms of minimum conditions; deviation from them is only possible based on a collective agreement. Provisions in employment agreements or works agreements cannot deviate in a way that is detrimental to the employee.

The employment relationship must have existed for at least six months before a full entitlement to paid annual leave accrues. The employment agreement or works agreement can only deviate from this waiting period in a way that favours the employee. This means that in the first six months of an employment relationship, the employee basically has no entitlement to paid annual leave – not even on a pro rata basis. In practice, the granting of paid annual leave can be agreed with the employer during this period and usually is agreed in order to prevent the accumulation of paid annual leave days in the following year.

The VAA Framework Collective Agreement for University Graduates (Manteltarifvertrag für akademisch gebildete Angestellte or Akademiker-MTV for short) applies to many VAA members and also contains provisions on paid annual leave. The waiting period of six months is set forth in Section 9 (1) of the Akademiker-MTV. Frequent reference will be made below to the Akademiker-MTV because it contains other favourable provisions for employees that extend above and beyond the law.

The relevant day for determining the beginning of the waiting period is the day on which the employment relationship legally begins under the employment agreement. It does not matter whether or not the employee is actually working. The employee is also entitled to paid annual leave in the event of an uninterrupted incapacity for work. The full entitlement to paid annual leave for the entire calendar year accrues when the waiting period ends.

LENGTH OF PAID ANNUAL LEAVE

Section 3 (1) BUrlG provides that every employee is entitled to at least 24 working days as paid annual leave. Working days in this context are all calendar days that are not Sundays or statutory public holidays, i.e. Saturdays must also be included in the calculation of the length of paid annual leave pursuant to the BUrlG. Calculated in terms of a five-day week, the entitlement totals 20 days or four weeks of paid annual leave.

Here, too, the Akademiker-MTV has a provision that is more favourable to employees since the entitlement to paid annual leave amounts to 30 working days pursuant to Section 9 (2) of the Akademiker-MTV. Based on customary practices at businesses in the chemical industry, working days are viewed as the days from Monday to Friday, giving rise to an entitlement to six calendar weeks of paid annual leave. Moreover, many individual employment agreements contain even more extensive entitlements to paid annual leave, often scaled according to length of service at the company and age.

Part-time workers have the full entitlement to 30 days of paid annual leave if they work every day of the week.

If they do not work every day of the week, the entitlement is recalculated accordingly. If an employee works, for example, a four-day week and has 30 days of paid annual leave, he/she is entitled to at least 24 working days as paid annual leave (30 ./. 5 x 4).

If an employee changes from full-time to part-time status within a calendar year during which he/she did not work every day of the week, he/she is left with the full entitlement to paid annual leave for the year of the change, generally 30 days.

Owing to the need for special social protection, lawmakers have also approved further minimum entitlements to paid annual leave other than the above for certain categories of employees. Of particular relevance in this context is the additional entitlement to five working days of paid annual leave for people with severe disabilities, i.e. individuals with a degree of disability of at least fifty percent within the meaning of Section 2 (2) of the German Social Code, Book IX (Sozialgesetzbuch IX, SGB IX). Their additional entitlement to five working days of paid annual leave arises from Section 208 (1) SGB IX. The prerequisite for obtaining this additional leave is to provide evidence to the employer of severe disability status.

PARTIAL PAID ANNUAL LEAVE (TEILURLAUB)

If an employee does not acquire a full entitlement to paid annual leave during a current annual leave year (Urlaubsjahr) due to the waiting period not elapsing or if he/she terminates the employment relationship before the waiting period elapses or after it elapses but in the first half of the calendar year, he/she is entitled to one-twelfth of the annual paid leave for each full month the employment relationship lasted (Section 5 BUrlG).

If fractions of paid annual leave days of at least a half day arise from this calculation, they must be rounded up to full days of paid annual leave in accordance with Section 5 (2) BUrlG.

If an employee leaves the company in the second half of the year after the waiting period ends, he/she receives his/her full entitlement to paid annual leave. This provision applies only to the statutory paid annual leave, whereby Section 9 (2) of the Akademiker-MTV contains a special provision here, too: If the employee leaves the company after 30 June of a given year, he/she has the full entitlement to 30 days of paid annual leave. If the employee joins the company after 30 June or if he/she leaves prior to 1 July, he/she is entitled to the portion of the paid annual leave commensurate with his/her period of service in that annual leave year.

GRANTING OF PAID ANNUAL LEAVE (URLAUBSERTEILUNG)

Both the BUrlG and Section 9 of the Akademiker-MTV entitle the employee to be put on leave, i.e. released from work duties, by his/her employer. What is missing, however, is a more detailed provision on how the employee can assert this right. It is precisely this lack of detail that causes a lot of confusion because most employees believe they can decide themselves when to take paid annual leave. The BUrlG takes the exact opposite point of view. Pursuant to Section 7 (1) BUrlG, the employer must grant the paid annual leave, taking into account the employee's preferences for when the leave is scheduled. If urgent operational requirements or preceding requests for paid annual leave from other employees run counter to these preferences, the employer can refuse to grant the leave. Urgent operational requirements can arise, in particular, during certain seasonal periods but also during set company holidays when the entire plant is shut down.

If there are conflicting requests for paid annual leave from other employees, interests must be weighed, with account taken of social considerations. Of particular significance in this regard are age, length of service at the company, number of children and whether they are in compulsory education, the spouse's occupation, etc.

To assert the entitlement to paid annual leave, the employee must express his/her corresponding request so that the employer can have the entitlement to paid annual leave honoured in that annual leave year. It is incumbent upon the employee to make this request. Timely assertion of this claim is essential in his/her own interest because otherwise the entitlement to paid annual leave is forfeited when the year or the carry-over period ends.

Pursuant to Section 7 (3) BUrlG, paid annual leave must generally be taken and granted in the current calendar year. A carry-over of the paid annual leave to the next calendar year is only permitted for urgent operational reasons or for personal reasons cited by the employee. Until now, no special carry-over act was required, i.e. no further act on the part of the employer or the employee.

In accordance with the latest rulings of the German Federal Labour Court (BAG), annual paid leave basically only lapses at the end of the calendar year if the employer has advised the employee of his/her actual entitlement to paid annual leave in advance, specifically asked him/her to take the paid annual leave and clearly instructed him/her in a timely manner about the expiration periods and their consequences. This applies at least to the statutory minimum paid annual leave (BAG 19 February 2019 – 9 AZR 541/15).

If carried over, the paid annual leave must be granted and taken in the first three months of the following calendar year. In this case, too, the Akademiker-MTV has a more favourable provision for employees in Section 9 (4). It stipulates that a non-asserted and non-utilised entitlement to paid annual leave is automatically carried over from the old calendar year to the new one and then must be granted by 31 March unless asserted to no avail. Although this view is not shared by the Federal Association of Employers in Chemistry (Bundesarbeitgeberverband Chemie, BAVC), it is supported in particular by a Federal Labour Court ruling of 13 May 1982 (reference number 6 AZR 12/80).

Employees are urgently warned against simply taking the paid annual leave of their own volition despite the employer denying it or not explicitly granting it. According to the established case law of the German labour courts, taking unauthorised paid annual leave of this kind is deemed important grounds for the employer to issue a termination for cause (without notice).

If the employer refuses to grant paid annual leave without giving sufficient reasons, the employee can demand it be granted by filing an action for performance or by seeking an interim injunction. Of course, since the initiation of litigation generally poses a major obstacle to the continuation of an employment relationship, it is understandable that employees rarely resort to these options. Notably, proceedings before the labour court would take too long: The paid annual leave in dispute would usually already be settled due to the passage of time.

In the granting of paid annual leave, care must be taken to grant it for a continuous period unless, again, urgent operational reasons or personal reasons cited by the employee require it to be split up. The reason behind granting a continuous period of paid annual leave is to meet the employee's need for rest. An uninterrupted holiday/vacation is the only way to address this need.

If the paid annual leave cannot be granted for a continuous period due to conflicting reasons and if the employee's entitlement exceeds twelve working days of paid annual leave, one part of this leave must consist of at least twelve consecutive working days (Section 7 (2) BUrlG). The widespread practice of splitting up the paid annual leave into as many as six one-week segments is therefore not the intent of lawmakers but is tolerated in practice.

Once the dates for the paid annual leave are set, they are binding for both employer and employee. Any change may only be made by mutual consent. In urgent emergencies, however, the employer can be justified in rescheduling the paid annual leave dates. In the event of of imminent danger, the employee is even obliged to break off a paid annual leave he/she has already commenced if requested to do so. Costs arising from breaking off this leave must be borne by the employer.

PAID ANNUAL LEAVE, MATERNITY PROTECTION PERIOD (MUTTERSCHUTZ) AND PARENTAL LEAVE (ELTERNZEIT)

Absences that arise from the prohibition of work under maternity protection law are deemed work time. If an entitlement to paid annual leave exists from the time before the maternity protection period, the remaining paid annual leave can be claimed after the deadlines expire in the current or next annual leave year (Federal Labour Court ruling of 17 May 2011 – 9 AZR 197/10).

A similar situation arises for parental leave. If the paid annual leave was not fully taken prior to the parental leave, the employer must grant the remaining paid annual leave after the parental leave in the current or next annual leave year. It must be noted, however, that the employer can reduce the paid annual leave by one twelfth for each full month of parental leave, but can do so only in connection with parental leave in cases where the parent is not working and not in cases where the parent is working part-time.

PAID ANNUAL LEAVE AND SICKNESS

The Federal Labour Court does not require the employee to have actually worked during the annual leave year to acquire the entitlement to paid annual leave. As a result, an employee who did not work the entire annual leave year but who became able to work again in the carry-over period up to 31 March of the following year is entitled to the entire paid annual leave from that previous year.

Additional paid annual leave agreed collectively or under individual agreements basically shares the same fate as the statutory minimum paid annual leave. However, the contracting parties are free to differ on this point, so that the statutory minimum paid annual leave would remain intact if the employee was unable to take it by the end of the carry-over period due to illness but the additional paid annual leave agreed collectively or under individual agreements would be forfeited. For this reason, more recent employment agreements often distinguish between the statutory minimum paid annual leave of 20 days and the extra-statutory additional paid annual leave of ten days.

Section 9 BUrlG prescribes that if an employee falls ill during his/her paid annual leave, the days of incapacity for work evidenced by a statement from a physician are not counted as part of that leave. After all, it is impossible to honour the entitlement to the leave from the time the employee falls ill onward, as being ill and unable to work is also a situation in which he/she has no obligation whatsoever to perform work. Thus the employer cannot release him/her from this obligation either.

The paid annual leave is not automatically extended by the number of days lost due to the illness. Instead, the days of incapacity for work not to be credited to the paid annual leave must be granted to the employee subsequently when he/she has become able to work again and his/her entitlement to that leave has not yet lapsed due to the expiration of a possible deadline, which can happen with protracted illnesses, for example.

If the employee has a long-term illness, the entitlement to paid annual leave does not lapse already on 31 March of the next year but rather not until 15 months after the end of the given annual leave year and thus on 31 March of the year following the next year. This change in paid annual leave law for long-term illness goes back to a ruling of the European Court of Justice. The Federal Labour Court (BAG) subsequently interpreted Section 7 (3) sentence 3 BUrlG as meaning 15 months in conformity with European Union law (BAG Rulings 142, 371).

GAINFUL EMPLOYMENT DURING PAID ANNUAL LEAVE

The idea of rest underlying the Federal Paid Annual Leave Act (BUrlG) would be negated if the employee were allowed to pursue any types of gainful employment while on paid annual leave. That is why Section 8 BUrlG explicitly forbids the employee from engaging in gainful employment while on paid annual leave that would run contrary to this purpose of rest. Engaging in gainful employment is defined in this context as performing any activity for others with the intention of earning money or goods as payment in kind. Activities not falling under gainful employment entail charitable work, favours, or work performed in one's own home and garden.

Gainful employment is contrary to the purpose of rest if it prevents the revitalisation of the employee's energy to work that is necessary to continue the employment relationship. The type and duration of any such activity must be evaluated.

The Federal Labour Court has ruled that the assertion of damage claims or claims for injunctive relief against the employer can be considered as sanctions to address a violation of Section 8 BUrlG. Finally, the possibility of a dismissal or a warning can be considered, with the circumstances of the individual case being the deciding factor.

PAID ANNUAL LEAVE AND TERMINATION OF THE EMPLOYMENT RELATIONSHIP

Many employment agreements specify that if the employee is dismissed by the employer but also if the employee terminates the employment, the employer is entitled to release the employee from work duties, with this leave credited to his/her entitlement to paid annual leave. A clause of this kind has not yet elicited concerns from the courts. In this situation, the employer is required to make clear to the employee that it is releasing him/her from work duties in order to honour his/her entitlement to paid annual leave. The release of the employee from his/her work duties only undertaken irrevocably till the end of the period of notice with continued pay does not yet contain an implied granting of paid annual leave, so the employee can still be entitled to a claim for payment in lieu of paid annual leave.

In principle, the employer can schedule the paid annual leave to be taken in the period of notice even against the employee's wishes. An employee needs to accept this decision unless it is not reasonable to expect him/her to do so, for example if he/she has already made set plans for holidays. But the employee must then object to the paid annual leave being during the period of notice, including concrete reasons for his/her objection. His/her mere act of objecting does not yet express a different request for paid annual leave.

If an employment relationship ends during the current annual leave year, double entitlements to the full paid annual leave must be avoided with the previous employer and the new one. The entitlement to paid annual leave therefore does not exist if the employee has already been granted paid annual leave for the current calendar year from a previous employer. Under Section 6 (2) BUrlG, the employer is obliged, on termination of the employment relationship, to give the employee a certificate stating the paid annual leave he/she was granted or in lieu of which he/she received payment in the current calendar year.

This provision does not open up the possibility for the employer of the previous employment relationship to shorten the paid annual leave, however. Nor does it provide grounds for entitling the employee to choose between the previous or the succeeding employer with regard to his/her claims. Rather, the certificate issued to the employee is intended to attest to the new employer how much paid annual leave the employee had received from his/her previous employment, so that the new employer can grant the remaining entitlement to paid annual leave pursuant to the BUrlG. If the employee fails to show the certificate to the new employer or uses other means to prove whether and how much paid annual leave has already been granted, the new employer is entitled to postpone the granting of paid annual leave.

If the employment relationship ends in the first half of the year, the employee acquires only a pro rata

entitlement to paid annual leave. In the event of termination in the second half of the year, the full annual entitlement to paid annual leave accrues and must be granted or compensated.

PAYMENT IN LIEU OF PAID ANNUAL LEAVE (URLAUBSABGELTUNG)

If the paid annual leave could no longer be granted in full or in part due to the termination of the employment relationship, payment in lieu of that leave must be rendered (referred to below as "leave compensation"). This claim to leave compensation pursuant to Section 7 (4) BUrlG is not a severance claim but rather a surrogate for the employee's claim to be released from work duties that can no longer be honoured after the termination of the employment relationship. A claim to leave compensation is therefore basically tied to the same prerequisites as the entitlement to paid annual leave. Thus, this claim also requires that the entitlement to paid annual leave would still have been able to be honoured if the employment relationship had continued.

A claim to leave compensation as a substitute for the actual entitlement to paid annual leave is therefore also not limited to the statutory minimum paid annual leave as laid down in the BUrlG but instead covers the employee's entire entitlement to paid annual leave. It also applies to the entitlement to paid annual leave pursuant to Section 9 of the Akademiker-MTV.

No leave compensation is paid in the case of a transfer of business, because the party acquiring the business must grant the not yet honoured entitlement to paid annual leave in kind, provided the employment relationship continues.

A provision deviating from the BUrlG is contained in Section 9 (5) of the Akademiker-MTV, which specifies that the existing claim to leave compensation due to the impossibility of granting paid annual leave lapses if the employee has otherwise violated his/her contractual duties in a particularly serious manner and leaves the company due to a contractual breach or due to a termination for cause without notice.

A claim to leave compensation also exists on termination of a fixed-term employment relationship. No claim to entitlement to paid annual leave exists if an older employee working part-time under a semi-retirement block model (Altersteilzeit im Blockmodell) still has a non-utilised entitlement to paid annual leave at the end of the active phase of this model.

If this leave can be granted even partially by the end of the employment relationship, this overrides a claim to leave compensation. If an employee deliberately prevents the entitlement to paid annual leave from being honoured before the end of the employment relationship in order to receive compensation, this is deemed an inadmissible "purchase" of the paid annual leave, which precludes a claim to leave compensation.

The leave compensation is calculated on the basis of the amount of paid annual leave the employee would have received if his/her still existing entitlement to this leave had been honoured in a continued employment relationship. Usually, this amount corresponds to the continuation of the pay that was contractually agreed.

The amount the employee receives as leave compensation, like the original entitlement to paid annual leave, is very closely linked to the person involved and thus not heritable. If the employment relationship ends due to the employee's death, the statutory entitlement to paid annual leave lapses and no claim to paid annual leave that could be passed to the heirs arises (Federal Labour Court NZA 2017, 207). No claim to leave compensation accrues if the employment relationship is terminated due to the employee's death. The claim to leave compensation arises on the termination of the employment relationship if the paid annual leave could not be granted fully or partially due to the termination. On the employee's death, however, the entitlement to paid annual leave lapses, which means that an entitlement to that leave no longer exists on termination due to death.

PAID ANNUAL LEAVE ALLOWANCE (URLAUBSGELD)

In many sectors, a paid annual leave allowance is also paid to exempt employees, i.e. those not covered by the standard collective agreement and pay scale. This allowance is paid additionally, above and beyond paid annual leave pay (Urlaubsentgelt).

An entitlement to a paid annual leave allowance can only exist on the basis of a special agreement, thus on the basis of a collective agreement, a works agreement or an individual employment agreement. However, time and again, agreements are concluded that contain provisions that only actually apply to the collective bargaining sector. A paid annual leave allowance currently amounting to EUR 1,200 is frequently paid in these cases.

UNPAID LEAVE (UNBEZAHLTER URLAUB)

Unpaid leave occurs when the employee, at his/her own request, is released from his/her work duties by the employer with his/her pay being forfeited.

In this instance, the employee and the employer must agree that the main duties arising from the employment agreement – work and pay – are not to be performed for the period of this unpaid leave. The employment relationship is thereby suspended. When the unpaid leave ends, the original employment agreement is revived again. The employer is free to decide whether to grant the employee unpaid leave unless there is a legal basis dictating otherwise (i.e. statutory/collective or operational/individual law).

If an employee falls ill or becomes unable to work during his/her unpaid leave, the employer is not obliged to continue paying his/her salary in accordance with the German Continuation of Pay Act (Entgeltfortzahlungsgesetz). The reasoning is that the loss of earnings is not due to illness but to the unpaid leave that preceded it.

It must be kept in mind that unpaid leave maintains the insurance obligation in social insurance only for a period of one month, provided that the employment relationship still continues. If the unpaid leave lasts longer, the health insurance still provides for a subsequent benefit claim for a further month, as long as the employee does not engage in gainful employment during this period. If unpaid leave beyond this period is granted, the employee must take out voluntary insurance.

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