

YPOG Briefing:

Latest Developments in Employee Participation Programs: BAG declares forfeiture of "vested" virtual options in case of resignation and accelerated de-vesting as invalid

Berlin, March 27, 2025 | Dr. Emma Peters, Silke Ricken

Many startups use employee participation programs like employee stock option programs (ESOP) or virtual stock option programs (VSOP) to motivate and retain their employees. Such programs allow the employees to participate in the company's financial success.

Occasionally, these programs include clauses that lead to the immediate and complete loss of vested options upon resignation or accelerated de-vesting, where vested options gradually expire after employment ends.

On 19 March 2025 (10 AZR 67/24 – [press release, only in German](#)), the Federal Labor Court (*BAG*) fundamentally outlined the limits of such forfeiture clauses, with significant implications for existing and future participation programs.

The Case

The plaintiff was employed by the defendant from 2018 to 2020 and received virtual options in 2019. In 2020, the plaintiff resigned.

According to the terms of the employee participation program, the vesting period is four years with a twelve-month cliff period. Vesting pauses if the employee is released from work without compensation. Upon resignation, all options, including vested options, shall expire. Vested but not yet exercised options shall also gradually expire within two years after termination of employment (so called de-vesting).

At the time of his resignation, the plaintiff had earned almost a third of his virtual options. He claimed them in 2022, but the defendant rejected the claim, citing the forfeiture.

Key Statements of the BAG

The BAG regards **vested options as a significant component of remuneration**.

Clauses that provide for the immediate forfeiture of all vested options (thus classifying as "Bad Leaver" case) upon resignation are invalid. They contradict the principle of sec. 611a para. 2 German Civil Code, which obliges the employer to pay the agreed remuneration, and constitute an inappropriate impediment to resignation, as the employee could not leave the company

until the occurrence of an as a rule still (very) uncertain exercise event without risking the loss of the options.

The court also finds **accelerated de-vesting**, as per the program's conditions, **invalid**. While the BAG acknowledges that staggered de-vesting reflects the diminishing influence of the employee on the company's value as he/she leaves the company. However, the provision that options expire twice as fast as they were earned does not adequately consider the time the employee has spent earning them.

With this ruling, the **BAG explicitly overturned its previous case law** on stock options (decision of 28 March 2008 – 10 AZR 351/07), which deemed the immediate forfeiture of vested options upon termination during a waiting period (in the context of startups "vesting period") permissible.

Possible alternative solutions

Since only the press release is available to date, the full ruling remains to be seen. In light of its 2008 decision, it is particularly questionable, whether the court will maintain the differentiation between resignation before and after the end of the vesting period and if forfeiture clauses, which are limited to cases of resignation/termination of the employment relationship during the vesting period, might thus be considered an appropriate impediment to resignation.

Additionally, the following alternative solutions for the invalid forfeiture clauses may be considered:

- **"Loyalty Cliff"**: It is conceivable to deviate from the widespread twelve-month cliff period and extend it to, for example, 24 months, thereby covering the loss of all options upon resignation for at least this period.
- **"Grey Leaver"**: It is unclear what the BAG's position is on so-called Grey Leaver cases. Typically, the Grey Leaver loses all unvested and 50% of the vested options upon resignation. Combined with a so-called Good Reason Carve-Out (e.g., resignation due to caring for close relatives), this could be seen as a balanced consideration of the interests of employers and employees, arguing against an inappropriate impediment to resignation.
- **"Back Loaded Vesting"**: Occasionally seen in the market, back loaded vesting involves vesting shares at progressively higher percentages rather than linearly (e.g., 10% in the first year, 20% in the second year, 30% in the third year, and 40% in the fourth year).
- **"Exit Based Vesting"**: Only a portion of the total allocated options (e.g., 50%) vest linearly/timewise, while the remaining portion only vests for the employee in connection with an exit event.

The final decision could also bring more clarity to the general stance of the BAG on de-vesting: the court does not appear to fundamentally disapprove of such clauses, as long as the de-vesting period is reasonable. Whether de-vesting clauses are enforceable across all leaver cases is at least questionable and restricting them to cases of resignation during the vesting period may be considered.

It remains open whether the BAG might see these possible alternative solutions as a circumvention of the present case law. In any case, however, they address the issue raised by the BAG and attempt to find a fair balance between the interests of employers and employees.



What Founders and Companies should consider now

Review existing ESOP/VSOP regulations and take the decision into account for adaptations/new programs: Companies should review existing programs for invalid forfeiture clauses. Forfeiture clauses in future programs should also consider the ruling.

Particular attention should be paid to clauses that provide for:

- the forfeiture of vested options in the event of an employee's resignation, and
- a gradual forfeiture of vested options after termination of the employment relationship, in particular, with a shorter forfeiture period than the vesting period.

We are happy to assist you in reviewing and revising, or setting up your employee participation programs, including tax-privileged programs under the German Future Financing Act (*Zukunftsfinanzierungsgesetz, ZuFinG*) (sec. 19a German Income Tax Act).