The reasons for the Federal Labor Court's decision on the time recording obligation are available - what does this mean for German practice?

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Since the announcement of the decision on the time recording obligation in the employment relationship on September 13, 2022 (1 ABR 22/21), the reasoning of the Federal Labor Court has been awaited. It is now available.

In the decision proceedings, the petitioning works council had asserted a right of initiative to introduce an electronic time recording system on the basis of Section 87 (1) no. 6 of the Works Council Constitution Act (BetrVG). The Federal Labor Court rejected such a right of initiative on the part of the works council because the employer has a legal obligation to record the entire working time of the employees anyway. This obligation results from Section 3, Subsection 2, No. 1, ArbSchG, according to which the employer must create a "suitable organization" for health protection. The recording of working hours is part of this.

The reasons for the decision indicate that a considerable amount of substantiation was required in order to derive an existing legal obligation for employers to record the entire working time of their employees from the provision of Section 3 (2) No. 1 of the German Occupational Health and Safety Act (ArbSchG), which had previously been treated rather neglectfully, by way of an interpretation in conformity with European law. The Federal Labor Court essentially based its decision on the provisions of the European Working Time Directive (2003/88/EC).

Core statements of the decision

Whether one considers the decision of the Federal Labor Court to be correct or incorrect is irrelevant for practice. In any case, employers are required to implement the requirements of the Federal Labor Court.

In particular, the decision makes the following key statements for practice:

- Recording and documenting the start, end and location of working hours is already mandatory under current law without a transitional provision. It is explicitly no longer sufficient to record only overtime worked.
- There is no clear statement in the reasons for the decision as to whether and how break times are to be recorded. However, the Federal Labor Court explicitly states that it should be possible to check the maximum daily and weekly working hours. This will not be possible without taking break times into account. It is therefore to be assumed that these are also subject to the recording obligation. This is also supported by the fact that "start and end of working time" should be understood to mean that the working time ends with a break and then starts again. According to this understanding, break times must be recorded in full.
- The Federal Labor Court has not clearly stated whether the obligation to record working time also applies to executive employees. It states that the legislator may make special provisions and exceptions for certain groups of employees, but has not done so "to date". As long as this is the case, the obligation to record working time applies to all employees. The Federal Labor Court expressly does not consider the statutory exceptions of the Working Hours Act, according to which, among others, executive employees are excluded, to be relevant. If you want to be sure of meeting all the requirements, you should therefore assume that the working hours of senior executives must also be recorded. However, this only applies as long as no deviating legal (or, if applicable, collective bargaining or company) regulation applies (see below in the penultimate bullet point).
- The employer can choose the method of time recording. This can be done electronically or in paper form. Here, too, it remains to be seen whether the legislator will make more detailed specifications in this regard. The introduction of an electronic time recording system is therefore not (at least not yet) mandatory.
- The employer can also decide who records the working time. He can transfer this task to the employees. This requires a corresponding instruction obliging the employees to record their working time. In this case, the employer remains obligated to control and monitor that proper recording actually takes place.

- "Confidential working time" is still possible. However, the hours worked in this context must be recorded. It is not possible to waive the recording of working time.
- If a works council exists, it must be involved in the structuring ("how") of time recording in accordance with Section 87 BetrVG. However, the works council cannot demand a regulation on time recording, since - according to the Federal Labor Court - there is no regulatory leeway for the "whether" of time recording.

- The Federal Labor Court clarifies that exceptions to the obligation to record working time are possible within the scope of the working time directive. Article 17 of the Working Time Directive allows the national legislator to make deviating provisions, i.e. to exempt certain groups of employees from time recording. However, the Federal Labor Court (unfortunately) makes no statement as to whether such exemptions can also be made by collective bargaining or works agreements. This is therefore still unclear. In our view, however, good reasons could be found for this in suitable cases in view of the scope offered by Section 3 of the ArbSchG and also the Working Time Directive.

- For the time being, it remains the case that there is no immediate threat of fines in the event of a breach of the obligation to record and document. The obligations incumbent on the employer under Section 3 of the German Occupational Health and Safety Act (ArbSchG) are only subject to fines if the competent authority has specifically imposed the obligation on the employer in an enforceable order.

Conclusion

The Federal Labor Court clarifies that it is still incumbent on the legislator to create legally secure regulations, in particular with regard to the scope of application (are executive employees also covered?) and any requirements for the concrete design (electronic or ana-log?) of time recording.

Irrespective of this, employers are already legally obligated to ensure that an appropriate time recording system is introduced and implemented. The unfortunate thing is that a time recording system that has now been implemented may have to be adapted again after the legislator has taken action.

Note

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