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Recording working time – the legislature takes action...

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The topic of working time, both generally and in particular regarding its recording, has been the subject of numerous specialist articles and case law at the highest level of the judicature for many years. After the Court of Justice of the European Union (CJEU) held in a much-noted 2019 decision that member states must introduce objective and reliable systems for tracking working time, the Federal Labour Court (Bundesarbeitsgericht, BAG) has recently – somewhat surprisingly – in a decision dated 13 September 2022 (*1 ABR 22/21*) stated that employers should now be obligated to record the working time of their employees on grounds of occupational health & safety. The court did not say anything about the methods of recording this working time.

The legislature has remained silent on this point for so many years. However, it is no longer possible for the legislature not to act since the decision of the BAG. A first **draft bill** of the Federal Ministry of Labour and Social Affairs (BMAS) on the subject of time recording has now been available since April.

I. Content of the draft bill

The draft only contains provisions on time recording. The German Working Time Act otherwise remains unchanged. The major provisions are:

- The central message is situated in section 16 (2) of the revised version of the German Working Time Act (Arbeitsgesetz, ArbZG). This obligates employers to **electronically** record employees' start and finish time and total **daily working hours on the day the work was carried out**.
  - Electronic recording is therefore compulsory. The explanatory memorandum states that employers would be able to choose what method to use. Classic Excel spreadsheets are listed alongside apps on mobile devices. Employers would also be permitted to electronically analyse rotas (if the actual times are also recorded). The requirement that timings are recorded electronically on the same day and therefore every day is impractical and downright bureaucratic and would not be feasible in some professions.

- The draft bill permits **delegation** of the recording to **employees** or third parties (e.g. supervisors).
  - Even then the recording must be done electronically. Employees would be obligated to do this if instructed to do so by their employer. In the digital age of mobile working and trust-based working hours this bureaucratic effort is as a rule

completely not in the interests of employees.

- Moreover, the (complete?) liability lies with the employers despite the delegation. Employers and corporate bodies are faced with the underlying danger of being fined for an administrative offence for every single employee, which leaves open whether the employee to whom the task of recording their working hours has been delegated likewise commits an administrative offence and is therefore acting illegally if they do not record their working hours, do not record them on the same day, do not record them electronically, or otherwise do not correctly record them.

- Section 16 (4) of the draft version of the German Working Time Act would allow **trust-based working hours**, according to its explanatory memorandum. This would be achieved by employers relinquishing monitoring the **working hours owed under the employment contract** and employees (electronically) recording their working hours daily.
  - All in all, this provision is **misleading**, as trust-based working hours typically imply that employees do not have to electronically record every individual piece of work carried out. As a result, there is not much left of this modern concept if at the same time employers, as envisaged in the draft bill, remain obligated under threat of a fine to take appropriate measures to ensure that they are aware of the breaches of the law. As working hours are not checked, there remains little to no scope for measures that ensure that the employer becomes aware of the breaches of the law. It should be noted that a breach has already been committed if employees do not record their working hours on the same day.

- Employees must inform the employer of their recorded working hours on request by providing a copy of the record. This is not a significant burden upon employers, as the data is (or must be) provided electronically in accordance with the concept of the draft law. It would be preferable for there to be a time constraint with regard to the frequency of the request and the period of time being asked about. It also remains unclear how this relates to requests for information if the employee was instructed by their employer to mostly record their working time themself. One thing is clear: it will be significantly easier for employees to show overtime in legal disputes.

- Section 16 (7) of the draft version of the German Working Time Act does provide certain **exceptions**. These are, however, explicitly restricted to **collective agreements** and **works agreements based on collective agreements**. Permitted deviations would be:
  - Recording working times in a non-electronic form
  - Dispensing with daily recording (but weekly at a minimum)
  - Exemption from the obligation to record working times for certain occupational groups (such as employees who determine their own working hours or whose total working hours are unable to be measured). The explanatory memorandum lists managers, distinguished experts and scientists as examples of this.

- In addition, the draft bill outlines extraordinarily high **fines** of up to **30,000 EUR** per breach of the record keeping obligation and the obligation to provide information.
- Transitional arrangements for smaller companies (50/250 employees) are proposed and as a rule companies with less than 10 staff members would be exempt altogether.

II. Evaluation

The draft bill is unconvincing. Both employers and employees would be burdened with bureaucracy, primarily due to the underlying criminalisation. In addition, the new regulations which solely relate to recording working hours completely miss the point in relation to the needs of working life, and in particular the requirements for an increasingly digital world of work.

Putting this into perspective it should be noted that this is merely a first draft of the bill. Within just a few days the draft bill has been confronted with quite considerable justified criticism from virtually all sides. Some revision phases are to be expected until the final draft of the bill has been produced. However, it can already be said that the legislature is acting somewhat despondently and is only addressing the recording of working time. It is not utilising the drafting freedom offered by EU law which has been previously shown many times. In addition, it seems that the long antiquated German Working Time Act is otherwise going to remain completely unchanged. Real life has called, in particular, for more flexibility regarding the scope of permitted daily working hours (section 3 ArbZG) and the question of rest periods in accordance with section 5 (1) ArbZG. Even the demonstrated necessity for exceptions for employees who are to a great extent in a position to determine their own working hours and/or are paid above average, as well as for certain groups of employees is ignored altogether. Instead of using the drafting freedom available under EU law which has been utilised by other EU member states in this area of working time law and enabling flexibility for employees and employers this draft bill is disheartening and only introduces further bureaucracy. Recollections of the German Notification of Conditions Governing Employment Act (Nachweisgesetz) spring to mind.

It should be noted that the essence of the instrument of trust-based working hours would, ostensibly, be undermined. The provisions envisaged in the draft bill are unsuitable. Basically it is only characterised in that the employer dispenses with monitoring the working hours owed under the employment contract (which regularly does not cover the working hours in terms of the German Working Time Act). But as with other types of employment employers will hardly (be able to) monitor the working hours of each employee on a day-to-day basis. Employers are also threatened with a fine for every infringement. Why should company management have to shoulder this (personal) risk? Why not dispense with trust-based working hours and enforce the recording of all working hours! In this way trust-based working hours will only continue to exist on paper, at least with this draft bill.

The needs of working life are even not provided for in the exemption provisions. Simplifying both the format and frequency of recording would only be available for those with collective agreements. Therefore, in practice, these simplifications miss the mark. On the one hand collective agreements are always required (and concessions from trade unions must usually be bought). On the other hand all companies without collective agreements in place from the outset, under constitutional law, are excluded from the option of obtaining an exception. It shows at the same time that simplifying matters for certain occupational groups is doomed to fail. The groups of people stated in the explanatory memorandum (specialists, managers, etc.) may in the rarest of cases fall under the scope of a collective agreement. The draft bill thus deliberately regulates an exemption for certain persons, and quite rightly so. At the same time, requirements are envisaged for this which as a rule cannot be fulfilled. The opening clause does not have a real field of application and is worthless in practice.

At least it has been clarified that (actual) executives are not affected by the obligation to record working time, as the German Working Hours Act does not apply to them (section 18 (1) ArbZG). It remains to be seen whether executives are subject to a recording obligation as per section 3 (2) ArbZG currently derived from the BAG, as is the case with other workers who are not covered by the German Working Time Act.

On further reflection, the opening clauses have also not been thought through. Churches and ecclesiastical associations are among the biggest employers in Germany. However, they do not use collective agreements, but instead have their own regulations referred to as the "third way". No opening clauses would be possible on the basis of such regulations (such as AVR (Guidelines for Employment Contracts), MAVO (Employee Representation Regulations), MVG (Employee Representation Act), for example). This loophole urgently needs to be corrected, especially as church regulations are expressly mentioned in other places (section 7 (4) ArbZG). Church regulations have also been recently enhanced in the German Notification of Conditions Governing Employment Act.

It is apparent that the new regulations have been borrowed from industries where an obligation to record working hours already exists; for instance, the low-wage sector (German Minimum Wage Act) and the meat industry. Strict regulations are justified here by social reasons. It is, however, completely inappropriate for such restrictive regulations to be a benchmark for *all* other employment contracts. For example, it would be a difficult burden for a highly qualified and highly paid IT specialist who is autonomous and does not work in one fixed place to separately record each item of work electronically. The legislature has squandered the chance here to comprehensively adapt the German Working Time Act to reality.

Further developments must now be awaited. We can hope that the draft is considerably improved while debated in the German parliament.

Note
This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Jens Völksen on +49 221 33660-504 or by email to jvoelksen@goerg.de. For further information about the author visit our website www.goerg.com.

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