Overtime all-inclusive? – Decisions by the Federal Labor Court on Blanket Compensation for Overtime

Introduction	Since the so-called "Reform of the Law of Obligations" came into effect on January 1, 2002, employment contracts are subject to the test of standard terms and conditions of contract as formulated in Sec. 305 et seq. German Civil Code. A variety of court judgments have been handed down on this topic over the past few years, and they have provided legal practitioners with an increasing degree of legal certainty concerning the question of whether and within what boundaries certain clauses in pre-worded, pre-printed standard employment contracts are permitted. In a decision from September 1, 2010 (Case no.: 5 AZR 517/09), whose grounds were recently published, the Federal Labor Court (*Bundesarbeitsgericht* [BAG]) again dealt with a provision in an employment contract according to which the overtime worked by an employee was to be compensated for on a blanket basis with his monthly base salary. The BAG confirmed the prevailing opinion in the case law of the lower courts and in the literature that pre-worded clauses stipulating that overtime was to be compensated for on a blanket basis and without limitation with the base salary do not stand up to the test applied for standard terms and conditions and are thus void. The pivotal argument for the Court in the specific case was that the clause under examination already failed to satisfy the transparency requirement of Sec. 307 (1) sent. 2 German Civil Code.
Facts of the Judgment of September 1, 2010 (5 AZR 517/09)	The plaintiff's employment contract contained a provision stipulating a duty to work overtime which was neither more clearly defined nor limited in scope. It also provided for the on-call-duty of the employee to work in the event of a business necessity outside of his otherwise clearly defined work hours. Finally, the contract provision on compensation included the statement, in addition to the regulation of the monthly base salary, that the "required overtime of the employee is compensated for" with this base salary. The defendant, i.e. the employer, maintained a working time account for the plaintiff based on a weekly target working time of 45 hours. Working time in excess thereof was credited to the working time account as extra work. It is uncontested that there was a credit balance of 102 hours upon the termination of the employment relationship; it was for these additional hours that the employee was demanding payment. The defendant argued that the credit balance was not to be separately compensated for, but that, in accordance with the terms of the employment contract, it had been compensated for with the monthly base salary. The plaintiff's action was successful before both the Local Labor Court and Superior Labor Court. The second appeal by the employer before the Federal Labor Court did not result in a different finding.
The Grounds of the BAG Decision	In the view of the BAG, the invalidity of the blanket compensation provided for in the employment contract was already founded in the fact that the provision was not sufficiently clear and understandable within the meaning of Sec. 307 (1) sent. 2 German Civil Code. A clause regulating blanket compensation for extra work is only then sufficiently clear and understandable in the view of the Court if the work performance to be included under this clause may already be inferred from the employment contract itself. Otherwise, it is not possible to recognize as of when a claim to additional compensation will

	exist. The scope of the duty to perform work must be so well-defined or capable of being defined by the specific limitation of the authorization to order extra work with respect to the scope of the overtime to be worked that the employee is already able to recognize what he could "be getting himself into" and what maximum performance he must provide for the negotiated pay when he signs the contract. In light of these principles, the BAG arrived at the invalidity of the clause in the specific case. The pivotal argument was particularly that a limitation of the permitted maximum working time under Sec. 3 Working Time Act could not be inferred from either the clause itself or from other provisions governing the working of overtime. This argument can be traced back to an older judgment of the BAG from September 28, 2005 (Case no.: 5 AZR 52/05) in which the Court was already assuming that provisions governing blanket compensation for overtime in employment contracts could only govern extra work permitted under the Working Time Act. Working time in excess of this (which is thus unlawful) cannot be ordered, but if overtime has been (illegally) worked, it must be paid for. A limitation to the extra work permitted under law, which was the deciding factor in the earlier case law, was not expressed in the contract under review in the present case; neither with respect to the authority to order extra work nor with respect to the blanket compensation for overtime with the monthly base salary. In the view of the BAG, the lack of clarity in the contract harbors the danger that the employee will waive in error the claims to which he is entitled. This danger was exactly the reason why the Court considered the specific clause to be unclear and thus non-transparent. As a legal consequence, the sued company was ordered to pay out the compensation for the uncontested overtime.
Recommended Action	The decision of the BAG from September 1, 2010 should be taken as an occasion to review and adapt, where necessary, the standard employment contracts in one's own company with respect to the provisions governing the working and payment of overtime, as well as with respect to possible exclusionary clauses serving to limit risk. In existing employment relationships, an amendment of contract upon the occasion of a raise could offer an opportunity to also adapt the provisions governing overtime pay to conform to the latest case law. Finally, and in addition to the issue of transparency, one must also take into account the thought, not yet conclusively dealt with by the case law, that a blanket payment for overtime with the base salary can lead to a disparity between work performance and consideration (pay) which is no longer legally permitted. To be able to come to a final legal evaluation of the lawfulness of those kinds of provisions, one must consider the position of the employee in the company and the applicable collective bargaining rules or works agreements.
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