

Reform of the Workplaces Ordinance

INTRODUCTION

At the end of 2014, a draft bill to reform the Workplaces Ordinance (*Arbeitsstättenverordnung* = ArbStättV) met with some severe criticism (including that of the president of the employers association, Ingo Kramer, who called it "bureaucratic madness in Absurdistan") and was halted, but now a compromise has been reached. On September 23, 2016, the Bundesrat passed the new "Draft of a Regulation to Amend Occupational Safety Ordinances" (BR printed matters 506/16), which was approved by the Federal Cabinet on November 2, 2016. The Regulation is now supposed to be published in the Federal Law Gazette and come into effect on the day following such announcement. The criticized first draft has been revised in many of its controversial points. In the following, we would like to present some of the new rules.

The new rules will likely be less onerous on employers than many had initially feared. A major aspect that it pursues is the unification of the regulatory landscape regarding occupational safety. This aims to harmonize relevant regulations (in addition to the Workplaces Ordinance, this includes, for instance, Industrial Safety Ordinance) with respect to their systems and depth of regulation. The primary goal is to simplify their application. At the same time, this particularly strives to take the technical innovations in recent years into account.

INTEGRATION OF THE VDU WORK ORDINANCE

One step in this process is the integration of the prior VDU Work Ordinance (*Bildschirmarbeitsverordnung* = BildscharbV) into the Workplaces Ordinance. The requirements placed on VDU workplaces will be transferred - in an updated form - into the new Workplaces Ordinance and the previous VDU Work Ordinance will become obsolete. This is meant to take account of the fact that VDU work stations have since become an elementary component of places of work. Updating in this area was particularly necessary due to the technological changes that have taken place since the last updating of the VDU Work Ordinance (e.g. tablets). The merger of these two regulations is to be expressly applauded.

RISK ASSESSMENT AND INSTRUCTIONS

The Workplaces Ordinance has been specified more clearly and supplemented with regard to the required risk assessment and the new requirement to provide instructions. As far as risk assessment is concerned,

this has primarily resulted from the inclusion of the VDU Work Ordinance, as well the monitoring of "mental strains", which already had been a known term in the field of occupational health and safety, has been included.

The duty to provide instructions concerning the risks arising from the workplace was already derived from the now superseded legal situation under Sec. 12 Occupational Health and Safety Act. This is now explicitly regulated in Sec. 6 of the new Workplaces Ordinance, whose structure corresponds to that of other workplace regulations (e.g. reference to risk assessment). The instructions include subjects such as emergency exits and first aid facilities.

INCLUSION OF TELEWORK

One controversial issue in the first draft was the explicit inclusion of telework. In contrast to the old Workplaces Ordinance, it is now included in the reformed regulation. However, and this point was often neglected in the political discussion surrounding the draft bill, the Workplaces Ordinance in effect until 2002 had already applied to telework, and telework has not been excepted from occupational health and safety provisions since then (e.g. Sec. 5 Occupational Health and Safety Act). For this reason, the definition that is now provided should be helpful as a clarification.

Telework is only covered to a limited extent by the new Workplaces Ordinance. Only Sections 3 and 6 of the Workplaces Ordinance as amended and Annex 6 (VDU Work) apply to it (risk assessment, instructions), provided these provisions are applicable in consideration of the peculiarities of telework, and provided it is not the same as jobs onsite at the company. According to this, the employer must conduct a single risk assessment of the telework and instruct the employees accordingly. The scope of application of the new Workplaces Ordinance with respect to telework thus corresponds more or less to the requirements for VDU workplaces.

This definition of telework will likely be of special significance for businesses. Sec. 2 (7) Workplaces Ordinance as amended defines telework as "VDU work firmly installed by the employer in the homes of employees for which the employer has defined a weekly working time and duration of the installation in agreement with employees". A telework station is not

deemed to have been installed until the necessary infrastructure (e.g. furniture, telephone) has also been provided and installed by the employer. According to the reasoning of the Bundesrat, this definition is meant to avoid conflicts between employers and employees and remove legal uncertainty. In addition, the requirement of the execution of an agreement is meant to make the involved parties aware of and regulate the right of entry for the employer that is necessary for him to comply with the occupational health and safety requirements. This basically corresponds to the recommendation that already existed under the previous legal situation. This should eliminate unclear situations in the future. Existing agreements and practices, however, should be reviewed whether they comply with the new regulations.

In contrast, neither occasional work from home or during travel (e.g. on a train) nor work "outside the office" without an installed VDU workstation is deemed to be telework. "Mobile work" – as an opposing concept to telework and work at the office – will continue to not be covered by the Workplaces Ordinance. Similarly, putting-out systems are not covered by the law.

VISUAL CONTACT TO THE OUTSIDE

A major dispute concerning the first draft was the planned change in Annex 3.4 of the Workplaces Ordinances as amended which regulated lighting and visual contact to the outside. In principle, workplaces should have visual contact to the outside. This is actually a return to the known practice, as there had already been provisions concerning this in the previous regulation. In the new version the proposed changes have been defused. As before, there are a number of work and social areas for which daylight and visual contact to the outside is regularly not required. The exceptions include the oft-cited kitchenette and, generally, "rooms in which daylight or other visual contact to the outside would be counterproductive on business, production or structural grounds" (e.g. at airports, photolabs).

In addition, there is also a grandfather clause which provides that rooms that were set up before the effective date of the new regulation will continue to be allowed to be used without visual contact to the outside until they are substantially expanded or converted. According to the grounds of the draft, "substantial" means that these measures are capable, in terms of their nature or scope, of also creating simultaneous visual contact to the outside (e.g. work on exterior walls).

WARDROBE

Contrary to the first draft, the new regulation no longer requires that the wardrobe that must be provided to each employee must also be capable of being locked if there are no locker rooms. This means that the new regulation only has different wording from the previous regulation, but that there are no changes in substance.

CONSEQUENCES FOR BUSINESSES

All in all, the actual changes are limited, at least from an employment law standpoint. The Ordinance will most likely even have a positive effect due to its specifications and clarification. This particularly applies to the definition of telework and the execution of risk assessments and instructions. With regard to the latter, one must keep in mind that the works council could be entitled to co-determination rights (see Client Newsletter 01/15)

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CONTACTS



Dr. Thilo Mahnhold

t.mahnhold@justem.de



**Christoph Frieling, LL.M.
(East Anglia)**

c.frieling@justem.de

www.justem.de