The Clock is Ticking – The Federal Labor Court and the Duty to Record Working Time

INTRODUCTION

One may assume, without exaggeration, that September 13, 2022 will take its place in employment law textbooks and history books: As has already been reported in many media outlets over the last few days, the Federal Labor Court („BAG“) decided on that day that all employers in Germany are now generally obligated to record the working time of their employees (judgement of September 13, 2022, File no.: 1 ABR 22/21). This ruling (which as yet has only been published in the form of a press release) is rightfully described as a spectacular verdict whose background and ramifications shall be discussed in more detail in the following:

FACTS OF THE DECISION

The subject matter of the proceedings was initially the question in works constitution law of whether a works council has a so-called “right to take the initiative“ with regard to the introduction of timekeeping systems, that is, if it can force an employer by way of its rights under Sec. 87 Works Constitution Act and via a conciliation board procedure to introduce timekeeping. While the Higher Labor Court of Hamm had ruled on the appeal that this was possible, the BAG has now decided that such a right does not exist.

What first looks like good news for the employer involved in the litigation turns out to be only a supposed victory when one takes into account the recognizable outlines of the reasoning of the BAG: The BAG rejects the right to take the initiative by reasoning that the works council does not have a co-determination right in “whether” working time must recorded **because the employer is already obliged by law to do so.** The question of “whether“ an employer must record working time or not is thus already answered by law so that this does not require any initiative on the part of the works council.

LEGAL BACKGROUND OF THE DECISION

Although the decision is somewhat surprising, it is not entirely unexpected. The European Court of Justice had already ruled some time ago (judgment of May 14, 2019 – C-55/18) that the E.U. member states must obligate employers to “introduce an objective, reliable and accessible system with which the daily working time of every employee can be measured“, (cf. our Client-Newsletter 05/2019). The ECJ did this by making reference to Directive 2003/88/EG of the European Parliament and of the Council of November 4, 2003 concerning certain aspects of the organization of working time and by supporting it by Art. 31 (2) of the Charter of Fundamental Rights of the E.U., according to which every employee has the right to a limitation of their maximum working hours. According to the core argument of the ECJ, this goal cannot be warranted effectively if working time is not systematically recorded.

The decision by the ECJ was, first and foremost, an instruction directed to national lawmakers. In its aftermath, an interpretation of the Germany Working Time Act to conform to European law, which would have resulted in a direct effect on German businesses, was discussed, but was largely rejected in light of the wording of the Working Time Act (which, as such, only requires a recording of overtime in Sec. 16 (2)).

A revision of German working time law is currently outstanding. Although the Federal Government had announced legislative initiatives and a dialogue with the involved parties in the coalition agreement and this was combined with the express wish to continue to make flexible working time models possible, a nationwide revision (including the regulation of timekeeping) is still pending. Since then, it may be possible to envision where this journey will end by looking at the draft bill of the Federal Ministry for Employment and Social Welfare for a 2nd Amending Act in the Minor Employment Sector which – limited to the sector of minor employment and a few other sectors - provides for a duty to record working time and maintain those records.

The BAG has now put pressure on legislators, but it remains to be seen how they will react. In some quarters it is expected that the legislative process will gain momentum. Unfortunately, it also appears possible that legislators will remain passive and leave the clarification of further issues to the courts.

PRACTICAL CONSEQUENCES

The ramifications of the decision are far-reaching: It can first be noted that the statement by the BAG does not by any means just concern those companies where works councils have been elected, even if the original question concerning works constitution law could lead one to reach a different conclusion. The duty stated by the BAG concerns **every employer**. Of course, working time is already being recorded in many businesses, but now even those businesses which had decided against timekeeping for whatever reason are now affected. One should please not think that this relates stereotypically to employers who deliberately want to keep working time as opaque as possible in order to save paying overtime, for instance. Rather, one should also have in mind the many small and medium-sized businesses this judgment will subject to yet another financial and bureaucratic burden in these already extremely difficult times!

In businesses with works councils, it must be taken into account that the works councils will invoke their **co-determination rights** to be involved in the specific design of the timekeeping system. The statement of the BAG that the works councils do not have any right to initiate timekeeping may never be misunderstood to mean that a works council is not entitled to any co-determination rights whatsoever when timekeeping systems are being structured. Rather, it will often be necessary here to enter into (new) works agreements regulating the details of timekeeping, including data protection issues related to how the collected data can be used and with respect to the monitoring of employee performance and conduct.

Furthermore, the **group of employees** for whom the timekeeping duty specifically exists is not currently clear. Does this also apply, for instance, to executive employees (who are not governed, as such by the rules of the German Working Time Act)? The exact reasons for the judgment of the BAG are thus of interest here. The court supports its decision on an interpretation of Sec. 3 (2) no. 1 Occupational Safety Act (and not, in fact, on the Working Time Act). There it is stated that the employer is obliged to "take all necessary occupational safety measures", to ensure in this context "an appropriate organization" and "to provide for the required resources". The BAG derives the duty to record working time from an interpretation of this statutory provision in compliance with European law. As opposed to the Working Time Act, the Occupational Safety Act itself refers to all "jobholders" It must also be noted that the applicable E.U. Directive assumes a broader understanding of the term "employee". The Working Time Directive, for instances basically includes executive employees as well (but provides in Art. 17 that the otherwise applicable requirements on working time and break times may be deviated from with regard to this group of employees). It can be expected that there will be a debate on the question of what this all means with regard to how far-reaching time keeping systems must be. The reasons of the BAG judgment may provide some answers

THE END OF TRUST-BASED WORKING TIME?

A discussion is currently flaring up again with regard to whether or not the decision of the BAG has now rung in the end of trust-based working time and other more flexible and modern working time models.

We find these fears to be exaggerated. First of all, the issue of how working time is designed must be distinguished from how it is recorded. Although it is correct that the timekeeping to be warranted by the employer is more complicated if an employee's work hours and place of work are flexible, this should however be a problem that can be solved fairly well. One by-product of the pandemic was that many employees came to appreciate the advantages of having a flexible place of work and flexible work hours. By and large, the fears on the part of employers that they would "lose control" proved to be unfounded. It would seem unlikely that lawmakers want to or can roll back this practical development. As already mentioned, the coalition agreement contains a basic commitment to flexible working time. One may thus hope that German lawmakers will actively exploit the (limited) room for maneuver provided in the Working Time Directive.

NEED FOR ACTION

To the extent this has not yet happened, businesses must now, at the very latest, check what specific timekeeping methods are meaningful with respect to their own workforce and then actually record working time. While it was possible, after the ECJ decision, to lean back and say that the demand was being made of German lawmakers, it is now settled that businesses themselves bear this duty. Many solutions are conceivable – from the classic timeclock to modern, Cloud-based solutions via an App. The technical implementation will be necessarily accompanied by legal considerations. In many cases, detailed co-determination questions will have to be addressed, such as the competence of the local works council or of the general works council, and, of course, regarding employee data protection issues. Finally, one must furthermore always ask whether the envisioned solution actually satisfies the requirements of an "objective, reliable and accessible system with which daily working time can be measured". We would be happy to assist you in dealing with these issues.

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