

The Big Bang for Recording Working Time – The Grounds of the Decision

INTRODUCTION

The time has come: the grounds of the decision on the recording of working time (Federal Labor Court judgment of September 13, 2022, 1 ABR 22/21; see [Client Newsletter 04/2022](#)) are now available. The job now is to come to terms with the consequences of this landmark decision of the Federal Labor Court, which has been drafted with remarkable care.

CORE STATEMENTS

As was to be expected after the press release, the Federal Labor Court (BAG) first develops a duty, by way of an interpretation of Sec. 3 (2) no. 1 Occupational Safety Act in compliance with European law, to install a system with which any and all working time in an operation is recorded. This duty applies irrespective of whether or not a works council has been instituted. Furthermore, the decision hands down the following core rulings for business practice:

- The working time recording system must collect and record the **start and end of daily working time**, including overtime.
- Whether or not the **situation concerning break times** must be recorded is not clearly stated by the court. In light of Art. 4 Directive 2003/88/EC this appears to be indicated and is probably inherent in the BAG decision where the court speaks of *any and all* working time.
- The duty to record working time does not exist for employees such as **executive officers** within the meaning of Sec 5 (3) Works Constitution Act, who are exempted from the application of Sections 18 – 21 of the Working Time Act.
- There is **no** general duty to **record working time electronically**; documentation in paper form may suffice, depending on the type of work and the business.
- Employees must actually make use of the working time recording system (**not voluntary**). However, it has not been ruled out that the recordkeeping of the hours in question can be delegated to the **employees**.

- The selection and design of the working time recording system must be guided by an improvement of the protection of health and safety. This also affects the question of whether working time is to be recorded digitally or if recordkeeping is to be delegated.
- With regard to the design of the working time recording system, the works council has a **right to take the initiative** under Sec. 87 (1) no. 7 Works Constitution Act in conjunction with Sec. 3 (2) no. 1 Occupational Safety Act. As negotiators, management and the works councils have been given leeway in how working time is recorded; this can be differentiated according to the type of work being performed.

CONCLUSIONS

There is a lot of work to do. Even if a violation of Sec. 3 Occupational Safety Act does not directly incur a fine, employers would be well advised to close the gaps in their occupational safety organization documented by the BAG decision. A need for improvement will exist in particular where working time is modelled on an **honor system**; the required, specific recording of working time may present significant challenges for the workday of some employees and necessitate changes in the way in which they work. At the same time, employers are well advised to clearly define the definition of **working time in compliance with occupational safety law**, such as during business trips, so that hours do not pop up in the working time recording system that are not working time within the meaning of the Occupational Safety Act. The fact that the treatment of travel time by the BAG practiced over many years (*Beanspruchungstheorie*) has become unstable through recent developments in European law does not make this task easier.

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