

UPDATE - GERMAN EMPLOYERS MUST RECORD THE WORKING TIME OF THEIR EMPLOYEES!

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The most important facts are briefly as follows:

EMPLOYERS ARE NOW OBLIGED TO RECORD EMPLOYEES' WORKING HOURS IN ACCORDANCE WITH SEC. 3 (2) NO. 1 OF THE GERMAN OCCUPATIONAL HEALTH AND SAFETY ACT ("ARBSCHG")

- A "suitable organisation" with the "necessary means" must maintain a record of employees' working time to protect employees' health, and monitor/control maximum working hours and the taking of rest breaks.
- As things stand at present, all daily working time, including start/finish times and overtime, must be recorded by the employer.

SCOPE OF THE NEW RULE

- All employees within the meaning of Sec. 5 (1) Sentence 1 of the Works Constitution Act ("BetrVG") are covered.
- It is arguable whether "executive employees" fall within the new rule, with the main arguments for and against as follows:
 - **Arguments** for a duty to record working hours of executive employees:

In principle, executive employees are also employees within the meaning of Sec. 5 (1) Sentence 1 BetrVG; however, the law only applies to them if it is expressly stated to be the case.

The Federal Labor Court bases the employer's obligation to record working hours on the ArbSchG and not the Working Hours Act ("ArbZG"). According to the ArbZG, executive employees are expressly excluded from the application of the new rules under Sec. 18 ArbZG.

The term "employee" in Sec. 2 of the ArbSchG is interpreted widely and would in principle also cover executive employees.

- **Arguments against** a duty to record the working hours of executive employees:

If there is a works agreement in place, with companies that have a works council as part of a working time recording system, then in practice executive employees are generally excluded from the scope of any works agreements. Executive employees are close to company management due to their role and position and should therefore not be involved in the activities of the works council. However, this could lead to an imbalance in respect of obligations regarding the recording of working hours in companies that have works councils and companies that do not.

The ArbZG, which provides particularly for regulations regarding maximum working hours and rest breaks, does not apply to executive employees.

- However, due to the underlying employee status of executive employees under the BetrVG and the wide definition of employees under the ArbSchG, we consider it advisable, as a precautionary measure, to include executive employees initially when complying with the obligation to record working hours under the new rules.

FLEXIBILITY FOR EMPLOYERS

- There is some flexibility regarding the nature of the time-recording system adopted, depending on the structure of the company
- The system must be "objective", "reliable" and "accessible".
- No specific form is envisaged, e.g., time recording does not necessarily have to be electronic, and is acceptable if written on paper.
- The recording of working hours can be delegated to and carried out by employees.

CO-DETERMINATION RIGHTS OF WORKS COUNCILS?

- Works councils have no right of initiative regarding the introduction of a working time recording system ("if"), as the obligation to record working time is a matter of law.
- Works councils have rights of co-determination within the meaning of Sec. 87 (1) BetrVG concerning the type of the time-recording system introduced ("**how**").

SANCTIONS?

- Under current law, employers do not face any direct fines for breaching obligations to record working time under Sec. 3 (2) No. 1 ArbSchG. A fine can only be considered and/or levied if (i) there is a legal ordinance under Sec. 18, 19 ArbSchG or (ii) there is an enforceable order by the authorities which is breached (Sec. 25 (1) ArbSchG).

OUTCOME AND NEXT STEPS:

- Legislators are required to specify the type of working time recording system in more detail and, in particular, to define the extent of the application of the new rules to individual employees.
- Employers are obliged to introduce a suitable working time recording system if this has not yet been carried out. Otherwise, existing time-recording systems should be reviewed to determine whether they meet the requirements of the new rules.
- If necessary, the relevant works council should be involved when deciding on the type of time recording system introduced.

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