How to make employers unhappy

New legislation ahead? Employees' right for a reduction in working time

By Dr. Guido Zeppenfeld, LL.M., and Marco Maurer

Subject to certain conditions, German employment law entitles employees to unilaterally demand a reduction in working time from their employers. Conversely, employees are entitled to extend their individual working time only in exceptional cases. As a result, employees demanding a reduction in working time often find themselves on a one-way street into a part-time working relationship.

At the beginning of 2017 it became public that this situation might soon change. A draft bill issued by the German Federal Ministry of Labor and Social Affairs *(Bundesministerium für Arbeit und Soziales, BMAS)* now proposes to implement a general employees' right to demand part-time work on a temporary basis. These developments provide employers with good reason to acquaint themselves with the current law on employee demands for reductions in working time.

Is part-time work a one-way street?

Employees' general right to demand a reduction in working time

Various regulations in Germany provide employees with a right to reduce working time in certain situations, including cases where employees are disabled or where they care for children or other dependents. This article will, however, focus on the general regulation stipulated in Section 8 of the German Part-Time and Temporary Working Act *(Teilzeit- und Befristungsgesetz, TzBfG)*. According to this law, every employee working at a company with a headcount of more than 15 employees is entitled to demand a reduction in working time as soon as he or she has been employed with the company for more than six months. The employee must apply for such a reduction at least three months in advance as well as specify his or her desired working time schedule.

Employer's reasons to refuse a demand to reduce working time

The employer may refuse an employee's application. To enforce his or her demand, the employee has to challenge the employer's refusal by initiating legal proceedings. According to the law, the employer has then to demonstrate and prove before court that the refusal was justified by adverse operational reasons. Even though a legal definition of this term does not exist, Section 8 of the TzBfG does provide some examples.

Substantial impairment of the business unit's organization

According to this stipulation, an operational reason particularly exists if the demand in reduction of working time would substantially impair the business unit's organization. However, such an argument raised by the employer would have to pass a three-stage test before the employment court.

In the first stage, the employer has to demonstrate that the company has established an organizational concept that required a certain system of working hours. In the second stage, the intended reduction in working time is examined to determine if it is actually incompatible with this system. In the third and final stage, the court assesses if the impairment of the established organization caused by the intended reduction in working time is substantial enough to justify the employer's refusal.

This example illustrates this process: An employer who intends to ensure a single-contact solution for the company's customers might argue that part-time work was incompatible with its established service-oriented concept. Such an argument may, per se, be considered a sufficient organizational concept in the sense discussed above. But the organizational concept does, of course, need to →

be plausible and has to be implemented steadily. This means for this example that referring to the single-contact solution would not likely be successful if the company's shop hours significantly exceeded the working time of a full-time employee or if other employees in comparable positions with customer contact were already employed with reduced working time.

Further operational reasons for a denial

Further operational reasons the employer might cite include a shortage of qualified workers, an overload caused by multiple demands for a reduction in working time or, in particular, if the reduction in working time would incur disproportional costs. Disproportional costs in this sense might incur if

- the employer was required to lease additional office premises or install additional and expensive technical equipment, or
- organizing a substitute workforce would be very expensive – for example, if the complexity of the work process requires a long training period.

On the other hand, costs that typically occur when splitting working places, such as increased expenditure on the human resources department, have to be accepted and cannot justify an employer's denial of a demand for part-time working hours.

Legal procedure following an employee's application

If the employer (partially or totally) disagrees with the employee's demand, the consensus-orientated law urges the parties to discuss the desired reduction in working time with the aim of reaching agreement. Employers cannot be forced into such a discussion, however an employer is well advised to seek dialogue with the employee and to state the company's position at this stage: The employer's objections to the employee's demand might be precluded in a possible lawsuit if they were not previously brought up for discussion.

If the parties fail to find a mutual solution, the employer has to unilaterally decide about the employee's demand at least one month prior to the intended reduction in working time. The decision does not need to contain a statement of reasons (at this point) but has to be issued in written form – i.e., with the handwritten signature of the employer or the employer's legal representative. If the decision is negative and issued in due form and time, the employee is required to request a substitution of the employer's consent before the employment court. In the absence of such a decision by the employer, the working time is automatically reduced and scheduled according to the request by the employee.

This procedure is, of course, obsolete if the employer consents to the employee's demand. The parties may even accelerate the legal process and implement the new working time earlier than the point in time for which the employee had initially applied.

Regardless of whether the employer consents to or justifiably refuses an employee's application, the employee has to wait at least for two years before he or she is entitled to reapply for a reduction in working time.

Draft bill to implement a right for a temporary reduction in working time

In the current legal situation, employees who demand a reduction in working time do not have a statutory right to return to their original working time. Only within narrow limits does Section 9 of the *TzBfG* allow part-time employees to apply for an extension in their working hours. The employer has to preferentially consider such applications only when filling a corresponding workplace that is vacant. It has to be assumed that the legal risk of getting stuck in a part-time employment relationship actually prevents a lot of employees from applying for a reduction in their working hours. Even though details about the draft bill from the *BMAS* have not been published yet, it is clear the proposed right for a temporary reduction in working time would significantly strengthen employees' legal position. Employers' are already criticizing the draft bill for substantially interfering with their right to organizational autonomy. In the end, however, it remains unclear whether the draft bill will ever be implemented into law. ←

Dr. Guido Zeppenfeld, LL.M.
Rechtsanwalt, German Managing Partner
Mayer Brown LLP, Frankfurt am Main

gzeppenfeld@mayerbrown.com

Marco Maurer
Rechtsanwalt, Associate
Mayer Brown LLP, Frankfurt am Main

mmaurer@mayerbrown.com

www.mayerbrown.com