Under the Bridge

Employee rights: a draft bill for the temporary reduction in working hours

By Marco Maurer

On June 13, 2018, the German cabinet adopted a draft bill giving, inter alia, employees the general right to demand a temporary reduction in working hours. "Bridging part-time employment" (*Brückenteilzeit*), part-time employment in a gap interval between periods of full-time employment – would be implemented as a new section (9a) in the German Part-time and Temporary Work Act (Teilzeitbefristungsgesetz, TzBfG). This new law would significantly expand legal alternatives for employees seeking more flexibility. Employers, on the other hand, would see their entrepreneurial freedom restricted if bridging part-time employment is passed into law. .

The draft bill is currently in parliamentary proceedings and is scheduled to come into effect as early as January 2019. Employers are therefore well-advised to prepare themselves now for potential employee requests for temporary part-time working hours. The following is an overview of the core terms of section 9a of the TzBfG as proposed (hereinafter: "section 9a TzBfG-D").

Background: the current legal situation regarding employee requests for a reduction in working hours

Currently, employees in Germany have the right to have their working hours temporarily reduced only in limited circumstances, including cases in which they are disabled or caring for their children or other dependents.

More broadly, section 8 of the current TzBfG grants employees the right to demand a permanent reduction in working hours if they have been employed with a company for more than six months, provided the company employs more than 15 employees. Section 8 TzBfG was outlined in more detail in an earlier Labor Law Magazine article in issue 1/2017 (see Zeppenfeld/Maurer: "How to make employers unhappy", https://www.laborlaw-magazine.com/wp-content/uploads/sites/31/2017/03/5_Zeppenfeld_Maurer_LLM_01_2017.pdf). However, because current law does not grant employees the right to return to their original working hours, applications for a reduction in working hours have often left employees stuck in a part-time working relationship that they are unable to reverse. If bridging part-time employment enters into force, this situation will no longer arise, as the new law adds a temporary reduction in working hours to employees' list of entitlements.

Scope of section 9a TzBfG-D and the application process

Under section 9a TzBfG-D, every employee working at a company with more than 45 employees will be entitled to demand a temporary reduction in working hours after having been employed with the company for more than six months. Employees can make this demand for a temporary reduction in working hours for a minimum length of one year, and up to five years, unless otherwise specified in a collective bargaining agreement.

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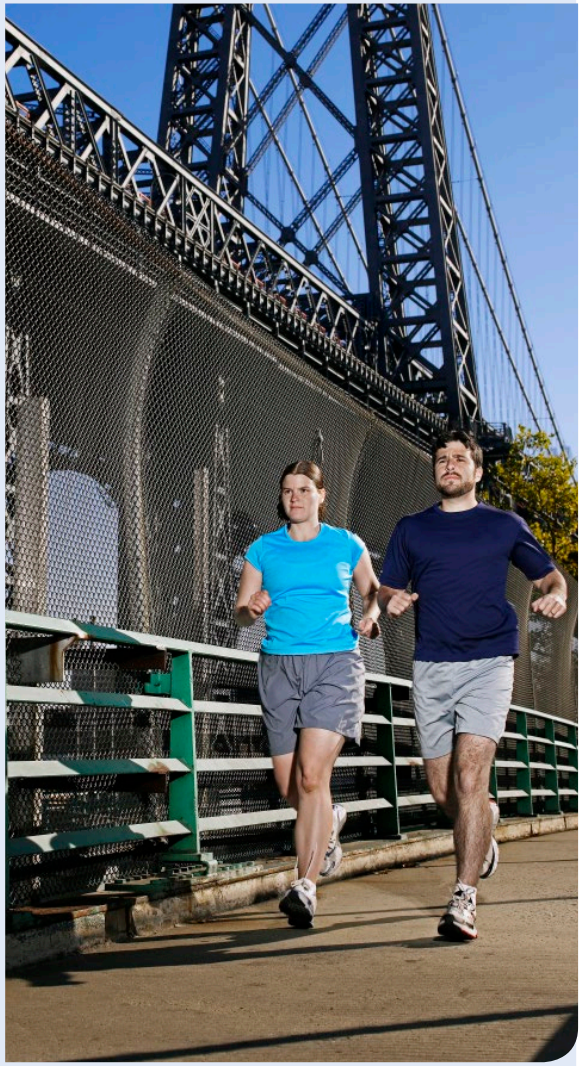

Employees in Germany have the right to have their working hours temporarily reduced only in limited circumstances.

Section 9a TzBfG-D has its basis in section 8 TzBfG and will largely refer back to the provisions laid down in this section. This primarily concerns the application process and its underlying timeline. Accordingly, applications for a temporary reduction in working hours will need to be filed by the employee three months in advance, and the employer will be required to reply in writing at least one month before the requested start of the reduction in working hours. Please see the earlier LLM article in Issue 1/2017 for more details on the application process and the legal consequences of violations (https://www.laborlaw-magazine.com/wp-content/uploads/sites/31/2017/03/5_Zeppenfeld_Maurer_LLM_01_2017.pdf).

Employer's right to refuse an application by reason of an adverse impact on operations

Employers will be able to refuse an employee's application pursuant to section 9a TzBfG-D by reason of an adverse impact on operations. If an employee challenges the employer's refusal in legal proceedings, the burden of proof lies with the employer to demonstrate that the refusal was justified due to an adverse impact on operations.

In terms of the requirements for claiming an adverse impact on operations, section 9a TzBfG-D again refers to the provisions laid down in section 8 TzBfG. As a result, the case law already developed in this context is likely to apply analogously to future cases of temporary reductions in working hours under section 9a TzBfG-D. The most relevant case law was already outlined in the aforementioned LLM article in Issue 1/2017. Particularly relevant is the three-stage test to determine whether an employee's request for a reduction in working hours would substantially impair a business unit's organization. However, in applying these principles, it will be necessary to consider that a temporary reduction in working hours on the basis of section 9a TzBfG-D will often lead to challenges and impairments in an employer's business that go beyond those resulting from a permanent reduction in working hours in accordance with section 8 TzBfG. Of particular concern will be the employer's need to recruit temporary substitutes to cover the missing work hours. Depending on the market situation, adequately qualified candidates may not be willing to work on a fixed-term basis only. On the other hand, if the employer hires a substitute with a permanent contract, the employer may face a workforce overload after the initial employee returns to his or her original working hours following the period of bridging part-time employment. With this in mind, in order for the courts to reach a fair compromise, it seems they must adjust the principles they have developed for determining whether an employee's request for temporary part-time employment will have an adverse impact on business operations. The courts must take into consideration the additional challenges and impairments a business may face when reducing an employee's work hours on a temporary basis.

Employer's right to refuse an application by reason of an exceeded threshold

In addition to the right to refuse a request for a temporary reduction in working hours by reason of an adverse impact on operations, Section 9a TzBfG-D introduces another exclusion criterion for employers with a routine maximum of 200 employees. These employers will also be permitted to deny a request for a temporary reduction in working hours if a certain number of employees are already scheduled to be working on a bridging part-time employment basis during the period requested.

The exact threshold depends on the size of the business. For example, the bridging part-time employment threshold for an employer with at least 91 and no more than 105 employees is seven employees simultaneously. Any application under section 9a TzBfG-D that would increase the number of employees simultaneously working temporarily reduced hours to eight or more could be refused by the employer on the grounds that this threshold would be exceeded.

Waiting period for employees between requests

Once an employee has applied for bridging part-time employment, one of the following waiting periods must elapse before another application may be submitted by the same employee:

- If the previous application was successful, the waiting period is one year, starting with the employee's return to his or her original working hours;
- If the previous application was denied, the following waiting periods apply:
  - The waiting period is two years following a justified denial by reason of an adverse impact on operations;

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- The waiting period is one year following a justified denial by reason of an exceeded threshold.

Conclusion and outlook

The information presented above demonstrates that, should this new law enter into force, the right of employees to demand bridging part-time employment within the scope of this statute would have a significant impact on employers' organizational autonomy. In view of this, section 9a TzBfG-D aligns with a number of recently passed and proposed pieces of legislation reducing employers' flexibility. This includes, but is not limited to, the restrictions under the 2017 revised act on employee leasing (*Arbeitnehmerüberlassungsgesetz*) and the limitations on fixed-term employment contracts proposed in the coalition agreement. Though the legislative motives for each initiative may be understandable, bit by bit, this restrictive trend may force employers to reassess their operational setup in Germany and evaluate possible alternatives that may, in the end, turn out to be less favorable for everyone involved. ←

Marco Maurer,
Rechtsanwalt, Associate,
Mayer Brown, Frankfurt/Main

mmaurer@mayerbrown.com

www.mayerbrown.com