Time recording now mandatory

Employers must control working time

By Dr. Marius Höfler

It could be expected that, as a result of the BAG's decision, it will be easier for an employee to demand compensation from the employer for overtime worked in the case of a missing time recording system.

Dr. Marius Höfler
Mayer Brown, Frankfurt/M.
Lawyer, Senior Associate

mhoefler@mayerbrown.com
www.mayerbrown.com

On 13 September 2022, the German Federal Labor Court (Bundesarbeitsgericht, BAG) clarified in a highly regarded decision (1 ABR 22/21) that employers are legally obligated to maintain a system in their companies by which the working time of employees can be monitored and recorded. So far, only the press release of the BAG is available. A final evaluation and classification of the decision will only be possible after publication of the reasons for the decision.

Facts

The applicant works council and the employers, who run a fully in-patient residential facility as a joint operation, concluded a works agreement on working time in 2018. At the same time, they negotiated a works agreement on the recording of working time, but no final agreement was reached on this. At the request of the works council, the labor court set up a conciliation committee on the topic of

"Conclusion of a works agreement on the introduction and application of electronic time recording." The works council requested a declaration that it has a right of initiative to introduce an electronic time recording system pursuant to Section 87 of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

Hamm Regional Labor Court (LAG) granted the works council's request and awarded it an initiative right with regard to the introduction of such an electronic time recording system.

Decision

The employers successfully appealed against this decision of the LAG. The BAG ruled that the works council cannot demand the introduction of an electronic time recording system from the employers as it has no right of initiative in this regard. In particular, it cannot base such a right on Section 87 (1) 6 of the BetrVG, as its application is excluded under the introductory sentence of Section 87 (1) of the BetrVG. According to this, the works council only has a right of co-determination insofar as a statutory regulation or a regulation by collective bargaining agreements does not exist.

In the opinion of the BAG, however, such a statutory regulation exists in the case of time recording. If Section 3 (2) 1 of the German Occupational Health and Safety Act (Arbeitsschutzgesetz, ArbSchG) is interpreted in accordance with EU law, an employer is legally obligated to record the working hours of its employees for the purpose of health protection. The result of the BAG's decision is thus in line with the so-called time clock ruling of the European Court of Justice (ECJ) from 2019. The relevant provisions of the ArbSchG read:

§ 3 Basic obligations of the employer

(1) The employer shall be obliged to take the necessary occupational health and safety measures, taking into account the circumstances affecting the safety and health of employees at work. They shall review the measures for their effectiveness and, if necessary, adapt them to changing circumstances. [...]

(2) In order to plan and implement the measures referred to in paragraph (1), the employer shall, taking into account the nature of the activities and the number of employees

1. provide for an appropriate organization and allocate the necessary resources [...]"

Against this background, the BAG has adopted the opinion that employers are, pursuant to Section 3 (2) 1 of the ArbSchG, obligated to establish an organization within their companies that enables them to control the working hours of their employees and thereby contribute to protecting their health. In the opinion of the BAG, such an organization can be an electronic time recording system, which is why a right of initiative of the works council to introduce such a system pursuant to Section 87 (1) of the BetrVG is excluded.

Practical advice and outlook

Although the aforementioned decision focused on whether the works council is entitled to a right of initiative with regard to the introduction of an electronic time recording system, the answer to this question is not what makes labor law practitioners sit up and take notice. Of particular interest in terms of labor law and corporate policy is the BAG's opinion with regard to Section 3 (1) and (2) of the ArbSchG, according to which employers are already obligated to record working time. Previously, it was assumed that renewed action by legislators and a specification of the Working Time Act would be required before working time also had to be comprehensively documented in Germany. The BAG has now prevented this. Companies must now check whether existing working time recording systems and processes need to be adapted. Employers that already monitor and record working time using a time clock or other means are likely to already meet the requirements of the ArbSchG. In companies with trust-based working time, a differentiation will have to be made. It will also be possible to leave the flexibility already associated with trust-based working time with regard to the distribution of working time untouched in the future. What is new, however, is that employees working on a basis of trust are also obligated to record their working time.

Notwithstanding the surprising decision of the BAG, there is no need for exaggerated actions by employers. After all, the practical consequences of a lack of a time recording system are manageable. Violations of Section 3 (2) 1 of the ArbSchG are not an administrative offence. Thus, there is at least no threat of fines if an employer does not immediately

introduce a working time recording system. However, it could be problematic how it will be legally assessed in the future if employees make a claim against an employer for payment of overtime and the employer has not introduced a time recording system. This could lead to a reversal of the burden of proof. In principle, employees have to prove that they have worked overtime and are therefore entitled to compensation. The absence of a time recording system could be interpreted by the courts as requiring the employer to prove that the overtime claimed by an employee has not been worked. So far, no court has ruled in this sense. However, due to the trend in case law toward employee-friendly decisions, it is not unlikely that such a reversal of the burden of proof will occur in the future. This means that it could be expected that, as a result of the BAG's decision, it will be easier for an employee to demand compensation from their employer for overtime worked if there is no time recording system.

It will only be possible to conclusively assess the effective scope of the BAG's decision when the reasons for the decision are available. ←