New rules proposed to record working time

Working Time Act – more questions than answers so far

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On 18 April 18 2023, the German Federal Ministry of Labor and Social Affairs (BMAS) presented the long-awaited draft amendment to the Working Time Act and other regulations. Following the decision of the Federal Labor Court of 13 September 2022 (case no. 1 ABR 22/21), the new law is intended to specify how employers must precisely record the working hours of their employees. The BMAS has not succeeded in making a big splash. Instead, the bill comes with a number of inconsistencies and questionable simplifications for employers bound by collective bargaining agreements (CBAs).

Starting point

On September 13, 2022, the German Federal Labor Court (Bundesarbeitsgericht) established, to the surprise of many, an obligation to comprehensively document the working hours of employees. The court identified this obligation by interpreting Section 3 (2) of the German Occupational Health and Safety Act (Arbeitsschutzgesetz - OHSA) in accordance with European law. According to the Federal Labor Court, employers within the scope of the OHSA are obliged to introduce and use a system with which working time can be recorded. The court did not make any further specifications on the design of the working time recording system. Section 3 OHSA, as a general clause, only regulates in the abstract that the employer is obliged to take measures that affect the safety and health of employees at work. Section 3 (2) OHSA determines that a suitable organization must be created to implement the aforementioned measures and that certain precautions must be taken to ensure that the measures are also implemented effectively. More specific regulations on the recording of working time, which take into account the de-

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cision of the Federal Labor Court, are missing. Section 16 (2) of the Working Time Act (Arbeitszeitgesetz - WTA) has so far essentially regulated that employers are obliged to record the working hours of employees in excess of the working hours per working day specified in Section 3 (1) WTA. This noticeably falls short of the far-reaching obligation that the Federal Labor Court has read into Section 3 (2) OHSA.

Consequently, employers were eagerly awaiting the BMAS's proposals for adapting the Working Time Act. In addition to more specific requirements for the design of the working time recording system, many were also hoping for greater flexibility in the Working Time Act, which would allow them to take advantage of the opportunities offered by the EU Working Time Directive. Compared to expectations, the bill that has now been presented is more than sobering.

Recording daily working hours electronically

The bill initially stipulates that employers must record the start, end and duration of employees' daily working hours on the day on which they perform their work. According to the explanatory memorandum, this is the only way to ensure objective and reliable recording. Later corrections of incorrect entries or making up for missed entries are not ruled out, but these must be made promptly. Common time recording devices or electronic applications, such as apps on cell phones, or even conventional spreadsheet programs (i.e., Excel, for example), can then be used for electronic recording. It should also be possible to collectively record working time by using and evaluating electronic shift schedules. However, this would require that the start, end and duration of daily working time remain calculable for the individual employees. As a result, individual deviations from the shift schedule must be documented. These records must be kept in German.

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The bill includes transitional provisions for the obligation to introduce and use electronic recording of working hours (instead of manual documentation) at least. In general, recording does not have to be electronic until one year after the law comes into force. For employers with fewer than 250 employees, this period is two years, and for employers with fewer than 50 employees, five years.

Recording by employees or third parties permitted

The bill provides that the employer may also assign the recording of working hours to employees or third parties (e.g., supervisors or also user companies). However, ultimate responsibility remains with the employer in this case as well. The employer must prove, for example, that it has properly trained and instructed employees, and that it checks the implementation of the recording of working hours on a random basis from time to time at least.

Trust-based working time "light" remains possible

The new regulations expressly provide that employers can continue to reach agreements with their employees in the future, according to which the employer waives the determination of the beginning, end and control of contractually agreed working time. However, in this case it is still necessary that the employer becomes aware of violations of the statutory provisions on the duration and location of working hours and rest periods. Consequently, as a first step, it is necessary to record the start, end and duration of working time even for trust-based working time. Violations could then be reported to the employer, for example, through automatic system messages.

Contradictory regulations on the duration of the retention period; information rights

The bill contains contradictory statements on the duration of the retention period. In part, it is stipulated that time sheets must be kept for at least two years. In a different context, it then states that the required records must be kept for the duration of the employment relationship, but no longer than two years. Employees must be informed of the recorded working hours on request. They may also request a copy (e.g., printout) of the records.

Extensive exceptions for employers bound by CBAs - possible violation of Art. 9 (3) of the German Constitution

The bill provides that only employers bound by CBAs may deviate from the essential requirements of the statutory regulations. The basis for such a deviation can be either a CBA or a works agreement permitted on the basis of a CBA. Instead of electronic recording, for example, manual recording in paper form may be sufficient. It may also be possible to record working time up to seven days after the day on which the work was performed. Finally – and this is particularly surprising – it would be possible, on the basis of CBAs, to dispense entirely with the recording of working time in the case of employees for whom total working time is not measured or cannot be determined in advance because of the special characteristics of the activity performed, or can be determined by the employees themselves. These far-reaching opening provisions for employers bound by CBAs are not comprehensible. There is no factual explanation as to why, in the case of employers not bound by CBAs, only an electronic record of working time created on the day the work is performed satisfies the requirements of objectivity and transparency in the recording of working time, while in the case of employers bound by CBAs, a manual timesheet created one week later can also suffice. With regard to the possibility of excluding certain groups of employees from recording working time, the explanatory memorandum to the bill correctly refers to Art. 17 (1) of the EU Working Time Directive. However, in contrast to other possible derogations in Art. 17 (2), the Directive does not stipulate that derogations are only possible by means of legal and administrative provisions, or by means of CBAs, or agreements between the social partners. At this point, the legislator falls short of the possibilities offered by the EU Working Time Directive. The far-reaching flexibility options for employers bound by CBAs lead to a considerable disadvantage for companies not bound by such agreements. The freedom of choice protected by Art. 9 (3) of the German Constitution not to join an employers' association (so-called negative freedom of association) is considerably restricted. Consequently, there are at least serious doubts about the constitutionality of the proposed regulation. However, in view of the current demands of the Federal Minister of Labor, Hubertus Heil (Social Democratic Party), for a national action plan to increase collective bargaining coverage, the planned improvement in the position of employers bound by CBAs with regard to recording working time is not surprising.

No clarity for "senior managerial employees"

The bill does not provide any clarity as to which requirements apply to senior managerial employees (leitende Angestellte) when it comes to time recording. It is true that the Working Time Act does not apply to senior managerial employees within the meaning of Section 5 (3) of the Works Constitution Act (Betriebsverfassungsgesetz – WCA), so that the provisions on time recording pursuant to Section 16 of the Working Time Act do not apply to this group. However, the Federal Labor Court has derived the general obligation to record working time from Section 3 (2) OHSA, which does not provide for any exceptions for senior managerial employees. How exactly the group of executive employees will be treated now remains open.

Risk of fines

Previously, employers were not subject to fines for violations of the obligation to record working hours in detail, as derived from Section 3 (2) OHSA. Violations of Section 3 OHSA have not been covered by Section 25 OHSA. It is true that violations of the obligation to record overtime regulated in Section 16 (2) WTA were already subject to fines. However, Section 16 (2) WTA fell well short of the requirements that are now to be expected. With the new rules coming into force, violations of the obligation to record the start, end and duration of daily working time now carry the risk of a fine. The same applies to failure to keep working time records for at least two years. Exceptions are again likely to apply to senior managerial employees who are not covered by the Working Time Act.

Outlook

The bill that has now been presented has reignited the political debate on the recording of working time and the urgently needed flexibility in this area. The bill still shows significant shortcomings and inconsistencies that need to be eliminated. The simplifications for employers bound by CBAs will also not meet with the approval of all political camps. ←