

Labour law

Fundamental decision from Germany's Highest Labour Law Court on the recording of working time

It seems to be clear - as an employer, you have a duty to introduce a system to record the hours worked by employees.

The Federal Labour Court (Bundesarbeitsgericht, BAG) ruled on 13 September 2022 that there is an obligation to record working time in Germany (decision of 13 September 2022, ref. 1 ABR 22/21). The BAG concludes this obligation from section 3, paragraph 2, no. 1 of Germany's Occupational Health and Safety Act (ArbSchG).

Already in May 2019, the European Court of Justice (ECJ) ruled that EU member states must require employers to establish an objective, reliable and accessible system of recording working time that allows the measurement of the daily hours worked by employees (judgment of 14 May 2019 - C-55/18; Case CCOO v Deutsche Bank SAE).

This ruling of the ECJ was now also referred to by the BAG for the interpretation of the German provision. "If one interprets the German Labour Protection Act with the stipulation of the European Court of Justice, then there is already an obligation to record working time," said the President of the BAG, Inken Gallner, at the oral hearing.

With this fundamental ruling, the BAG is moving forward in the debate on amendments to the German Working Time Act, while the federal government is still working on implementing the requirements of the European Court of Justice.

But what does it mean for employers and the current working time models or new areas such as remote work? The decision seems surprising, because until now the legal opinion has predominantly been that there is no obligation to generally record time in Germany, as there is no clear legal basis for this. According to the German Working Time Act, only overtime and Sunday working time had to be documented so far, but precisely not the entire working time.

The primary issue in the litigation history on the works council's right of initiative and its denial in the new decision seems to be misleading.

The BAG points out that section 3, paragraph 2, No. 1, ArbSchG, is a provision which prescribes that the employer must "ensure appropriate organization and provide the necessary means" in order to ensure health protection. In view of the aforementioned ECJ case law, this also includes the measurement and recording of working time. Thus, this decision will have significant consequences not only for the defendant employer - and subject to a detailed examination of the written reasons for the judgement, which are still pending - but also for all employers!

Outlook - Change in working time recording

It is to be expected that employers will have to deal with various questions of operational organization of their business. And these are complex. Hopefully, the BAG will elaborate in its written reasons, which duties and freedoms are still possible for employers. Answers would be desirable especially with regard to the trust-based working time models frequently applied in private companies and public service up to now, including mobile work and home office. Will there be any drastic changes regarding the recording of working hours? It can already be predicted that without some kind of recording of the working hours of employees in the company, it will no longer be possible, even if there is no works council in the company. Particularly with regard to the frequently used trust-based working time models and even mobile work and home office, there may have to be drastic changes regarding the recording of working hours. Does this still fit in with the new everyday working life in the context of the Covid pandemic?

Consequently, it is advisable to already check and, if necessary, adapt the working time regulations and also the digital or analogue documentation options in your company.

We recommend a paperless and audit-proof recording of working hours in order to be able to fulfil the verification obligations, for example, in the case of an official audit.

Use our HealthCheck on the topic of HR Compliance - Time Management. We support you in determining the concise need for action, assessing risks, options as well as labour relations management. We can provide you with comprehensive support in the introduction of modern, reliable and accessible processes and systems:

Our team advises you comprehensively from the planning and conception to the GoLive of process and IT solutions.

Starting with an ACTUAL analysis of your processes and system landscape, in which we identify needs for action and define requirements for the time recording system. The process evaluation and the creation of a list of requirements are followed by the market analysis and the corresponding selection and implementation

of a new time management solution that is tailored to your company. Effective change management is an integral and crucial success factor for the implementation of a system. It is often neglected that such an implementation can bring serious changes for all areas and employees. Therefore, remember that the introduction of a time recording system is not only about the solution itself, but also about successful and sustainable change management. Here again, we can support you with our tried and tested change and project management approach.

We provide you with one-stop advice on Fit for Purpose time recording systems, the design of corresponding processes, data protection-compliant implementation and accompany you during implementation and negotiations with employee representatives.

Finally, don't forget the compliance aspect with regard to the duties of your executive bodies such as managing directors, board members and supervisory board members.

Feel free to contact us.

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Editorial

If you have any questions, comments or remarks about the newsletter, please do not hesitate to contact our editorial team. We look forward to your feedback.

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