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News on the Recording of Working Hours - The legislator is now "getting into the Swing of Things".

Dear Reader,
dear reader,

After the Federal Labor Court (Bundesarbeitsgericht - BAG) ruled on September 13, 2022 that employers are obliged to introduce a system to record the working time worked by employees and to ensure that this system is also used (BAG - 1 ABR 22/21) - we reported - the legislator has now also got into gear. On April 18, 2023, the German Federal Ministry of Labor and Social Affairs (BMAS) presented the first draft of a bill to amend the Working Hours Act. The draft law is intended to create regulations for recording all working time in light of the decisions of the European Court of Justice (ECJ Case 55/18 CCOO - we also reported on this) and the Federal Labor Court.
With this article, we would like to provide a brief overview of the main contents of the draft and the further procedure.

I. Specifications for the Recording of Working Time

The draft law stipulates that employers will in future be obliged to electronically record the beginning, end and duration of the daily working time of employees on the day on which they perform their work. The recording can also be done by employees themselves or by third parties. However, the employer remains responsible for the proper recording.

A specific type of electronic recording is not to be prescribed. In addition to the time recording devices already in common use, other forms of electronic recording using electronic applications such as apps on a cell phone or the use of conventional spreadsheet programs are also possible. This means that Excel lists can also be kept. Furthermore, collective recording of working hours through the use and evaluation of electronic shift schedules should also be possible. However, this is only possible if the start, end and duration of the daily working time can be derived from the shift schedule for the individual employees, as well as deviations from the working times specified in the shift schedule.
Records shall be retained for the duration of employment, but no longer than two years.
Upon request, the employer shall inform employees about the recorded working time and provide a copy of the records. The obligation to provide information may also be fulfilled by allowing employees to view the records relating to them in the electronic working time recording system and to make copies.

II. No Abolition of Trust-based Working Time

According to the draft law, the agreement of trust-based working time should also continue to be possible. This is done by allowing the employer to effectively transfer the recording obligation to employees, who are then free to organize their working time and record it accordingly. However, according to the draft law, the employer is obliged to take appropriate measures to ensure that it becomes aware of violations of the statutory provisions on the duration and location of working hours and rest periods. However, this does not represent a change in the current legal situation.

This is because the employer is already obliged to pay attention to this in the case of trust-based working time and, if necessary, to ensure that the statutory requirements, in particular regarding maximum working hours and rest periods, are complied with.

III. Relief for Small businesses and Companies covered by Collective Agreements

According to the draft law, employers with up to 10 employees are to be exempt from the electronic recording obligation. However, the basic obligation to keep records still exists.
Furthermore, the draft law provides for a classic collective agreement opening clause. According to this clause, exceptions to the requirements for recording working time may be agreed in a collective agreement or on the basis of a collective agreement in a works or service agreement. Among other things, it should be possible to agree that permanent non-electronic recording or downstream recording is possible. Furthermore, it should be possible to agree that certain groups of employees are exempt from the obligation to record working hours.

IV. Transitional Period and new Fines

The draft law stipulates that the requirements for electronic recording of working hours are not to be implemented immediately when the law comes into force. Instead, there is to be a transitional period for implementing the statutory requirements, staggered according to the size of the company.
In the future, violations of the obligation to electronically record working hours and the duty to provide information will constitute an administrative offense punishable by a fine of up to 30,000 euros.

V. Conclusion and Outlook

The BMAS draft bill provides an initial direction for employers. However, this only opens the legislative process and further discourse, as the BMAS has forwarded the draft to the cabinet for further voting.
It is to be hoped that the draft will still be adjusted in some places. For example, it is not clear why employers who are not bound by collective agreements should not be able to agree exceptions to the requirements for recording working time with their works councils or employees. Furthermore, it remains questionable whether the obligation to electronically record the duration of working time also means that rest breaks and their start and end must be recorded - at least this is not explicitly provided for in the draft law.
Employers who do not yet have an electronic time recording system can therefore now entertain the idea of introducing one. However, hasty actionism is not recommended.

If you have any further questions, please do not hesitate to contact our labor law team, which will also keep you informed about the further legislative process.

Your employment law team

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RECHTSANWÄLTE | STEUERBERATER

Labor law

Your contact to the employment law team:

Im Breitspiel 9
69126 Heidelberg
Tel. 06221 3113 43
arbeitsrecht@tiefenbacher.de
www.tiefenbacher.de

Dr. Gero Schneider M.C.L.
Lawyer / Partner
Specialist lawyer for labor law
Team leader labor law

Tiefenbacher Attorneys at Law
Im Breitspiel 9
69126 Heidelberg
Tel. 06221 3113 43
schneider@tiefenbacher.de

Stefanie Engelmann
Attorney at Law
Specialist attorney for labor law

Tiefenbacher Attorneys at Law
Im Breitspiel 9
69126 Heidelberg
Tel. 06221 3113 80
engelmann@tiefenbacher.de

Veronika Jung, LL.B.
Attorney at Law

Tiefenbacher Attorneys at Law
Im Breitspiel 9
69126 Heidelberg
Tel. 06221 3113 43
jung@tiefenbacher.de

J. Michael Auerbach
Attorney at Law
Specialist lawyer for labor law

Tiefenbacher Attorneys at Law
Im Breitspiel 9
69126 Heidelberg
Tel. 06221 3113 19
auerbach@tiefenbacher.de

Niklas C. Gradinaroff
Attorney at Law

Tiefenbacher Attorneys at Law
Im Breitspiel 9
69126 Heidelberg
Tel. 06221 3113 43
gradinaroff@tiefenbacher.de