The Working Time Draft Bill – Nine to five for all?

INTRODUCTION

Everywhere people are talking about working time. Following the most recent decision of the Federal Labor Court (BAG) (see our **Client Newsletter 6/2022**), the Federal Ministry of Labor and Social Affairs (BMAS) has now submitted a new draft bill. Initial comments on this proclaim: *"Electronic timekeeping is to become mandatory."* Leaving aside a few nuanced details, this is correct and was thus to be expected and not exactly sensational.

Sensational developments may yet come, however, for the "hot potato" of working time law under which exceptions from the rigid requirements of recording working time are permitted for certain groups of people remains (materially) untouched.

EXCEPTION UNDER SEC: 16 (7) NO. 3 OF THE DRAFT BILL

In addition to the (general) exception for executives and similar employees, there is a further exception to the new, general duty to electronically record working time, albeit only "*in a CBA*" or "*in a company or works agreement based on a CBA"* and for employees *"whose total working time cannot be defined in advance because of the unique nature of their work",* etc.

This wording originates from Art. 17 (1) Directive (2003/88/EC), which, however, provides for possible exceptions from major working time requirements as such and not only with regard to timekeeping. Why the working time requirements are supposed to continue to apply to the stated groups in the draft bill, but the duty to document compliance does not, is not really consistent, even from the view of lawmakers.

REFERENCE TO COLLECTIVE BARGAINING - A UNIQUE GERMAN APPROACH

This is joined by the actual problem: The CBA-reference contradicts to the basic principle of working time law under which privileged groups – condensed under "*executive employees*" (cf. Art. 17 Directive, Sec. 18 Working Time Act) – are (and can be) treated differently. A look at business practice shows, however, that collective bargaining agreements are generally **not applicable** here, and that **no** collective bargaining agreements **even exist** for many of the (liberal) professions to which it applies. Certain professions are excluded *per se* from the exception. In addition, other constitutional concerns exist under the aspect of the freedom not to join labor unions or employer organizations *(negative Koalitionsfreiheit)*.

PRACTICAL REQUIREMENTS

A bill is not yet a law. With this in mind:

- ***The unique German approach "CBA-reference-only" under which an exception from the duty to record working time is only possible through or under CBAs is as such inconsistent and contradicts the basic principle of German and European working time law and is likely unconstitutional under the aspect of the freedom not to join labor unions or employer organizations.***
- ***Furthermore, the procedure supplies a new reason to not only take a look at exceptions to the timekeeping duty, but also to take a look at general exceptions; "Nine-to-five for all", only excluded for the vaguely defined "executives", does not do justice to the challenges of a modern services economy and Work 4.0.***
- ***Exceptions specific to certain professions, which have now been put forward by some professional organizations, do not provide sufficient answers; the BAG has also defined a few parameters with a view to Art. 3 of the German Constitution, as recently exhibited by its constitutionally compliant interpretation of the special regulation of Sec. 45 of the Public Accountants Code (File no.: 7 ABR 15/10).***
- ***A look at European neighbors shows the way: A combination between objective reasons and minimum wage limits (e.g. by the minimum wage or Civil Servants Act) offers feasible approaches; Sec.16 (7) Nr. 3 with the objective reasons stated there is going in the right direction.***

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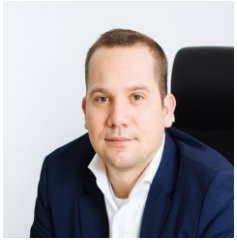

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