



## Labor Law

# German Federal Labor Court obliges Employers to introduce Time Recording Systems

Dear Readers,

Already in mid-September of 2022, it was said the German Federal Labor Court (Bundesarbeitsgericht, in the following “BAG”) in Erfurt dropped a bombshell, when the press release of the decision 1 ABR 22/21 was published. From the statements made there, it was often assumed – not yet knowing the reasoning of the decision – that employers have the direct obligation to record the working hours of their employees. Last Friday, on the 3<sup>rd</sup> of December 2022, the BAG published the long-awaited reasoning for its decision. And it can be said: in fact, employers are directly obliged to provide a time recording system for their employees to record their working time. However, it is also important to note that work councils do not have the right of initiative to introduce such a time recording system. In this newsletter, we would like to inform you about the exact ruling of the BAG and the resulting to-dos from it for employers.

### **I. Decision of the BAG dated September 13<sup>th</sup> 2022 – 1 ABR 22/21**

The parties to the proceedings disputed whether the works council has a right of initiative to introduce an electronic time recording system to record working hours.

The employers operate a fully inpatient residential facility as a joint business. The claimant works council has been formed there.

The parties closed a collective agreement on working hours (“BV Clinic Planner”). At the same time, they negotiated a collective agreement on the recording of working hours. An agreement could not be reached on the latter topic. At the end of May of 2018, the employers decided to introduce an electronic time recording system at the company.

Pursuant to the request of the works council, the labor court set up a conciliation body with the subject matter “Conclusion of a collective agreement on the introduction and use of electronic time recording”. The employers objected to the competency of the conciliation body.

In the subsequent resolution proceedings initiated by the works council, it took the view that it had the right of initiative to introduce an electronic system for recording working hours. The use of such a system be in the best interest of the employees, particularly for health protection. The labor court denied that motion, the state labor court approved it after the works council appealed the decision of the labor court. In their appeal to the BAG, the employers seek to reinstate the decision of the labor court.

The BAG ruled the employers’ appeal successful. The state labor court had wrongly granted the appeal of the works council against the decision of the labor court in which the works councils’ motion had been rejected. The works council is not entitled to the requested right of initiative.



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**The essential statements of the BAG then however followed in the reasoning of the decision, as employers nevertheless are obliged to introduce a time recording system.**

In detail:

The right of initiative the works council had requested does not comply with Section 87 para. 1 first half sentence of the Works Council Constitution Act (BetrVG), as the works council cannot have the right of initiative if the matter is regulated by statutory law.

Such be the case, as employers are already obliged by statutory law to introduce a system which can record beginning and end and thus the duration of working hours, including overtime. This legal obligation is a conclusion of Section 3 para. 3 no. 1 of the Occupational Health and Safety Act (ArbSchG). According to this general provision the employer must ensure “suitable organization” and provide “necessary resources” to comply with Section 3 para. 1 ArbSchG, taking into account the type of work and number of employees. If understood in conformity with the law of the European Union, this general provision also includes the – general – obligation of employers to introduce a system, which records the daily total working time of their employees, including beginning and end and thus including overtime.

As long as the lawmaker has not (yet) passed a specific regulation, a range as to the “form” in which said system can be applied is existent (thus already ECJ 14<sup>th</sup> of May 2019 – C 55/18 – [CCOO] para. 63).

The BAG also clarifies that executive employees are excluded from the obligation to record working time. Finally, the BAG spells out the right of co-determination of the works council when it comes to the design of the time recording system. That means, the employers can decide, “whether” to introduce a time recording system (even though they are legally obliged to do so according to the same decision discussed here!), but have to involve the works council when it comes to “how” such a system is being implemented.

### II. Current To-Dos for Employers

Based on the decision, employers should do or check the following:

- **Establishment and introduction of a time recording system, which record beginning, end and duration of working time or verify whether the existing system already does this.**
- **In co-determined companies, the works council is to participate regarding the implementation of the time recording system.**

### III. Legal Consequences in Case of Violation of the Obligational Time Recording System

It is reassuring that a violation of the obligation outlined by the BAG does not have immediate consequences. The BAG bases the obligation to introduce a time recording system on Section 3 ArbSchG. According to Section 25 ArbSchG, a violation of an obligation is not subject to fines per



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se, but can be following specific orders of the occupational health and safety authority.

As you can see from the above, employers should begin to implement a time recording system as soon as possible if one does not already exist. We would be happy to assist you in evaluating your current systems or designing one.

It remains to be seen whether the decision of the BAG is the final say in the discussion on the obligation to provide time recording systems. In particular, the lawmakers could exempt or limit certain groups from this obligation based on size or specific nature of the company. Of course, we will monitor any legislative activities on your behalf.

We wish you a continued happy and contemplative Advent season and remain with best regards from Heidelberg.

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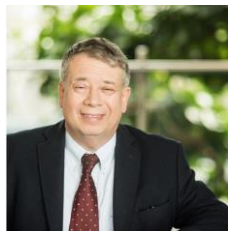
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