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How to Implement Compliance Measures Required by Recent Developments in European Employment Law (e.g. time recording, vacation, whistleblowing) in Entities Active on an International Scale

Gero Schneider
Moderator
TIEFEBACHER ATTORNEYS | TAX ADVISERS
Heidelberg, Germany
schneider@tiefenbacher.de

Melanie Gassler-Tischlinger
GPK PEGGER KOFLER & PARTNERS
Innsbruck, Austria
melanie.gassler-tischlinger@lawfirm.at

Anneli Lönnborg
FYLGIA
Stockholm, Sweden
Anneli.Lonnborg@fylgia.se

Introduction

Labor and Employment law is an area of law which, in comparison to other areas of law, is particularly influenced by European Union law. The influence of Union law is based on primary European legal requirements, European directives that must be implemented by national legislators and the binding decisions of the ECJ. The most recent developments in European labor law relate to the documentation requirement, the recording of working hours, vacation, a ban on headscarves and whistleblower protection. In each case, they entail new and burdensome requirements for the employer. In the following, the European developments in labor and employment law will be presented and the consequences, in particular new obligations for employers, will be elaborated.

The Legal Order of European Law

The constitution of the EU, and particularly the fundamental values it embodies, are initially very abstract and need to be fleshed out by Union law. This makes the EU a legal reality in two different senses: it is created by law and is a Union based on law.

The term 'legal source' has two meanings: in its original meaning, it refers to the reason for the emergence of a legal provision, i.e. the motivation behind the creation of a legal construct. According to this definition, the 'legal source' of Union law is the will to preserve peace and create a better Europe through closer economic ties — two cornerstones of the EU. In legal parlance, however, 'legal source' refers to the origin and embodiment of the law.

The first source of Union law in this sense is the EU founding treaties, with the various annexes, appendices and protocols attached to them, and later additions and amendments. These founding treaties and the instruments amending and supplementing them (chiefly the Treaties of Maastricht, Amsterdam, Nice and Lisbon) and the various accession treaties contain the basic provisions on the EU's objectives, organisation and modus operandi, and parts of its economic law. The same is true of the Charter of Fundamental Rights of the European Union, which has had the same legal value as the treaties since the Treaty of Lisbon entered into force (Article 6(1) TEU). They thus set the constitutional framework for the life of the EU, which is then fleshed out in the Union's interest by legislative and administrative action by the Union institutions. The treaties, being legal instruments created directly by the Member States, are known in legal circles as primary Union law.

Law made by the Union institutions through exercising the powers conferred on them is referred to as secondary legislation, the second important source of EU law.

It consists of legislative acts, non-legislative acts (simple legal instruments, delegated acts, implementing acts), non-binding instruments (opinions, recommendations) and other acts that are not legal acts (e.g. interinstitutional agreements, resolutions, declarations, action programmes). 'Legislative acts' are legal acts adopted by ordinary or special legislative procedure (Article 289 TFEU). 'Delegated acts' (Article 290 TFEU) are non-legislative acts of general and binding application to supplement or amend certain non-essential elements of a legislative act. They are adopted by the Commission; a legislative act must be drawn up explicitly delegating power to the Commission for this purpose. Where uniform conditions are needed for implementing legally binding EU acts, this is done by means of appropriate implementing acts, which are generally adopted by the Commission and, in certain exceptional cases, by the Council (Article 291 TFEU). The Union institutions can issue recommendations and opinions in the form of non-binding instruments. Finally, there is a whole set of 'acts that are not legal acts' which the Union institutions can use to issue non-binding measures and statements or which regulate the internal workings of the EU or its institutions, such as agreements or arrangements between the institutions, or internal rules of procedure.

These legislative and non-legislative acts can take very different forms. The most important of these are listed and defined in Article 288 TFEU. In the way of binding legal acts, it includes regulations, guidelines and decisions. In the way of non-binding legal acts, the list includes recommendations and opinions. This list of acts is not exhaustive, however. Many other legal acts do not fit into specific categories. These include resolutions, declarations, action programs and White and Green Papers. There are considerable differences between the various acts in terms of the procedure involved, their legal effect and those to whom they are addressed; these differences will be dealt with in more detail in the section on the 'means of action'.

The creation of secondary Union legislation is a gradual process. Its emergence lends vitality to the primary legislation deriving from the Union treaties, and progressively generates and enhances the European legal order.

Vacation

Vacation law is one of the areas of labor law that is most influenced by European Union law. Based on primary European legislation such as Art. 31 II of the Charter of Fundamental Rights with its guarantee of paid vacation, the Working Time Directive (Directive 2003/88/EC) in particular contains relevant provisions. According to the case law of the European Court of Justice, the right to recuperation leave is also a particularly important principle of the social law of the Union, which may therefore not be deviated from in principle.

Expiry of Vacation Entitlement

Employees are entitled to a certain number of days of minimum leave per year. In Germany for example, the minimum leave is at least 24 working days in accordance with Section 3 I of the Federal Leave Act. These 24 working days are provided for in Art. 7 of the Working Time Directive. If an employee does not take these vacation days within the year, the question arises as to what happens to the so-called remaining vacation days. According to legal regulations, the entitlement usually expires at the end of the year (Art. 7 III of the Federal Leave Act). According to statutory regulation, the entitlement to vacation automatically expires. However, this automatic forfeiture of the entitlement to vacation misjudges the limits that member states are obligated to observe. According to Art. 7 of the Working Time Directive and Art. 31 II of the Charter of Fundamental Rights, an acquired entitlement cannot lapse after the expiry of the reference period or after the expiry of a carry-over period specified in national law if the employer has not enabled the employee to exercise his entitlement to leave. Accordingly, vacation entitlement no longer expires automatically, but employers must point out the impending expiration of vacation. Employers must clearly inform their employees that vacation must be taken by a certain date and will otherwise be forfeited. According to the latest decision of the ECJ, this rule of forfeiture only after sufficient information also applies to a vacation entitlement in the event of illness.

Limitation of Vacation Entitlement

In addition to the expiration of vacation entitlements, the statute of limitations for vacation entitlements must also be considered. Acquired vacation entitlements could be subject to national regulations on the statute of limitations. In However, according to current ECJ case law (ECJ, judgment of 22.9.2022 - C-120/21), this is only possible if the employer has ensured that the employee was actually able to exercise his or her vacation entitlement. The employer may not evade its duty to provide information. Therefore, the limitation period can only start to run when the employer has fulfilled its information obligations with regard to the claiming of leave and the employee has actually been informed. The employee's mere knowledge of the existence of a leave entitlement is not sufficient. The purpose of the statute of limitations under civil law is to ensure legal certainty. However, it must not be used by the employer to gain an advantage with regard to his own omission. If the employer were allowed to invoke the statute of limitations for the employee's claims without the employee having enabled him to exercise the claims, the result would be to approve conduct that would lead to unlawful

enrichment of the employer and run counter to the purpose of Art. 31 II of the Charter of Fundamental Rights, which is to protect the health of the employee. Although the employer has a legitimate interest in not being confronted with vacation requests dating back more than three years, it is not entitled to protection if it caused this situation itself because the employer did not put the employee in a position to actually exercise the entitlement due to a lack of information.

Obligations of the Employer in Practice

It follows from the above that the employer has comprehensive obligations with regard to the expiry or limitation of vacation entitlements. These include a duty to inform, a duty to notify and a duty to request. In principle, the employer is free to decide how to comply with these obligations. But the employer must choose suitable and appropriate means. In any case, abstract statements in leaflets, in the employment contract or in a collective agreement are not sufficient. The employee must be able to decide freely, in the knowledge of all relevant circumstances, whether to take his leave. Whether the employer has done what is required will have to be decided taking into account the circumstances of the individual case. The employer bears the burden of presentation and proof. It therefore seems sensible to provide individualized notification in text form to the individual employees at the beginning of the year.

Documentation Requirement

The Directive on Transparent and Foreseeable Working Conditions in the European Union, in short, Working Conditions Directive (RL 91/533/EEC) has replaced the previously applicable Documentation Directive (RL 91/533/EEC). The purpose of the directive is to create more legal certainty and legal clarity in the employment relationship. For employees, working conditions should be transparent and predictable. The directive continues the existing obligation of the employer to inform the employee about all essential aspects of the employment relationship, but expands it by introducing material minimum requirements for individual working conditions, such as the duration of the probationary period and deadlines in the event of a call for work. There are also changes to the legal consequences, including a presumption of conformity to improve enforcement.

Scope of Application

In order to close gaps in the scope of application of the previously applicable Documentation Directive, the new Directive links to "parties to employment contracts and parties to employment relationships".

Parties to Employment Contracts

The first alternative covers all persons, subject to a few exceptions, who have entered a contract of employment as defined by Member State law. Possible exceptions to the applicability are comprehensively limited by the Directive, in particular for persons who are employed only to a small extent (Art. 1 III of the Directive).

Parties to Employment Relationships

According to the second alternative, the Directive is also applied to employees who are parties to an employment relationship. Accordingly, it is relevant that someone performs services for another person during a certain period of time according to the latter's instructions, for which he receives remuneration in return. According to EU law, the personal and instruction-bound activity can be based on other legal grounds than an employment contract, and the instruction-bound nature is assumed to go beyond the area of personal dependence. According to another view, the second alternative should also depend on the respective member state's understanding of the term. A binding interpretation is ultimately reserved for the ECJ.

Information in Form, Timing and Content

According to Art. 3 of the Directive, the information must be provided in writing. In addition to paper form, electronic form is expressly permitted under certain conditions.

An important change also concerns the due date. It is brought forward by Art. 5 I. For a large part, the information must be provided by the seventh calendar day after the first working day. For the remaining information, a one-month deadline applies.

In particular, the obligation to provide information on the termination procedure is essential. Formal information, including the time limit for taking legal action, is required in particular.

New Legal Consequences

Under the new Directive, information in accordance with the Directive is a prerequisite for the effectiveness of a call for work. Chapter IV of the directive contains, among other things, the order that a work call that does not comply with the directive is not binding. Thus, it is henceforth possible under Art. 10 of the Directive that employees in employment relationships with largely unpredictable working hours may refuse a work assignment that the employer has not instructed in compliance with the framework conditions requiring instruction.

The Directive contains a new presumption in favor of the employee. Art. 15 of the Directive explicitly provides for evidentiary consequences of failure to inform. The employee is to benefit from a rebuttable presumption in his favor, possibly after a prior reminder or notification, if the employer has not provided the information-requiring aspects in due time. This is intended to ensure comprehensive enforcement of the directive's requirements.

Verification Laws

Scope of Application

The new verification law applies to all employees without exception.

New Verification Catalogue

There are many new aspects about which information must now be provided, such as the duration of the probationary period, the end date of the fixed term or even the eligibility of the place of work as well as the agreed rest breaks and rest periods. These are probably easy for the employer to comply with. More critical is the provision that the employer is obliged to inform the employee of the procedure to be followed when terminating the employment relationship, at least the requirement that the termination must be in writing, the time limits for termination and the period and filing of an action for protection against dismissal. It is problematic that there is no basis in the Directive for these three minimum requirements. For practical purposes, it is ultimately advisable to provide comprehensive information on the entire termination procedure. Whether this is then more comprehensible and transparent for the employee is another question.

Deadlines

In the case of newly established employment relationships, the law provides for different deadlines for handing over the essential terms and conditions of employment depending on the type of employment conditions (from the first day of work performance to no later than one month after the agreed start of the employment relationship). In practice, this will result in all terms and conditions of employment being handed over on the first day. Changes to the terms of the contract must now be communicated to the employee in writing on the day they

take effect. Processes must therefore be developed within the company to ensure that, if necessary, information is provided on the exact day.

Form

The essential working conditions must be recorded in writing. The electronic form remains excluded according to § 2 I 3 of the Verification Act at least in Germany for example. This is surprising, since Art. 3 of the Directive expressly permits electronic form.

Working Time Recording

Although the Working Time Directive (Directive 2003/88/EC) does not explicitly stipulate the obligation to keep a complete record of working time, it is "extremely difficult or even practically impossible" to enforce the rights guaranteed by the Directive without such a system. Articles 3, 5 and 6 of the Working Time Directive, in conjunction with Article 31 II of the Fundamental Rights Charter, require an objective, reliable and accessible system for recording the daily working time of all employees. However, the ECJ does not define the exact requirements for an "objective, reliable and accessible system", but leaves it up to the Member States to decide how it should be designed. Nevertheless, there are qualitative requirements for a working time recording system to be set up:

- An objective system requires verifiable and usable data.
- Reliability requires a reliable and trustworthy system. Manipulation must be prevented.
- Accessibility requires a system that enables immediate access to the data by employees, the employer, the works council and the supervisory authority. This is the only way to ensure that employees' rights are exercised and observed.

Compatibility with a Digital, Networked Agile Working World

The compatibility of comprehensive working time recording with a digital, networked and agile working world is questionable. The comprehensive obligation to record working time could represent a step backwards in terms of flexibility with regard to the introduction of trust-based working time and home office. However, the recording of working time is not only possible by means of a time clock, but modern forms of recording working time are also available, such as apps or integrated software.

Concrete Design of the Working Time Recording

For the employer, the question arises how the working time should be recorded. There are two options, technical or manual recording.

In any case, the ECJ does not rule out manual recording. Automatic or technical recording is not specified.

The system-based recording of the employee's log-in and log-out data is precisely not an effective means of enforcing employee rights to minimum rest and maximum working hours in every respect. On the one hand, turning on the computer or opening a particular system does not automatically mean that work is being done. This is particularly evident in models of constant accessibility, where the employee remains logged into his or her company e-mail account even during his or her free time, for example, but only actually works when contacted. On the other hand, even employees who basically work digitally do not perform their work entirely on the computer. Activities such as reading printed documents or simply thinking cannot be reliably recorded, and in particular cannot be distinguished from a break. Therefore, recording log-in and log-out data would also not meet the effectiveness requirement in many cases.

Data protection must also be taken into account when recording working time. The employer has a legitimate interest in recording working time because it must ensure and monitor compliance with working time regulations, but this must not lead to total surveillance. Even the recording of log-in and log-out data on the company or home computer is already to be classified as not insignificant monitoring. Accordingly, the recording and permanent storage of keystrokes and mouse movements without any reason, as well as the recording of the specific work content, is not permissible. However, this would be necessary if the system were to decide on its own whether what the employee is currently doing is also "work". Only then would absolute objectivity be created by keeping the employee completely out of the recording.

Manual recording could rather provide opportunities for manipulation. But no system is free of manipulation possibilities. The mere assumption that manipulation is made more difficult with technical time recording is in any case not suitable for undermining the disregard for data protection principles, in particular the prohibition of total surveillance.

Wearing of a visible expression of political, religious or ideological convictions in the workplace

The wearing of a visible expression of political, religious or ideological convictions, such as the wearing of a headscarf, is repeatedly relevant in labor law practice. Concrete case in point: A Muslim woman who had worked as a customer advisor and cashier at a drugstore since 2002 wanted to wear a headscarf after her parental leave, unlike before. However, the drugstore instructed her to come to work "without conspicuous large-scale signs of political, ideological or religious convictions." She filed a lawsuit against this. According to two recent ECJ rulings (ECJ of 15.7.2021 Ref. C-804/18; C-341/19), a ban on wearing a visible expression of political, ideological or religious beliefs may be justified by the employer's need to project an image of neutrality to customers or to avoid social conflict. However, this justification must correspond to a genuine need on the part of the employer, and the national courts may take into account the context of their respective Member State, and in particular the more favorable national rules with regard to the protection of religious freedom, in the context of balancing the rights and interests at stake. In practice for the employer, it follows that he must regularly tolerate the wearing of a visible expression of political, religious or ideological convictions.

Whistleblower Protection

Whistleblowers, for many people they are considered heroes, as the enlightenment of society is more important to them than the fear of possible consequences. They are primarily concerned with drawing attention to misconduct, illegal machinations or unethical behavior that is often also of public interest but not intended for the eyes of the public. To do this, whistleblowers often risk a great deal. In some countries, such as Germany, there is not yet sufficient protection for whistleblowers against dismissal or other personal disadvantages. This is to be remedied by the Directive on the Protection of Persons Reporting Breaches of Union Law, in short Whistleblower Directive (EU Directive 2019/1937 of 23.10.2019). The directive provides for the first time a uniform legal framework for the protection of whistleblowers throughout Europe. The aim of the directive is to strengthen the protection of persons who disclose breaches of requirements determined by EU law, either internally or externally. Specifically, the Directive includes the obligation to introduce minimum standards to protect whistleblowers from retaliation for reporting breaches of law in certain EU policy areas. The directive thus improves the protection of whistleblowers and at the same time presents companies with new challenges.

Scope of Application

Personnel Scope of Application

Work-related Relationship

All persons who have a work-related relationship with a company in the broadest sense are protected. Thus, the personal scope of application is not limited to active and former employees of a company within the meaning of Art. 45 TFEU, but also includes atypical employment relationships, such as temporary workers. It also covers self-employed board members and shareholders of the company, job applicants, voluntary employees as well as trainees, subcontractors and suppliers (Art. 4 of the Directive). The protection also covers relatives and other third parties who are in contact with the whistleblower and could suffer professional reprisals as a result of a whistleblower. For example, if a husband and wife are employed by the same employer and one of them acts as a whistleblower, the spouse of the whistleblower is also protected if he or she is dismissed or otherwise disadvantaged by the employer.

Good Faith and Motivation of the Whistleblower

According to Art. 6 Ia of the Directive, a whistleblower is covered by the personal scope of application only if he or she has reasonable grounds to believe that the information he or she reported was true at the time it was given and falls within the scope of this Directive." Persons who knowingly report false or misleading information are not protected. However, the motivation of the information does not matter for the protection of the whistleblower. For example, if an employee requests a salary increase from the employer and, after his request is denied, reports the employer to the authority because of a grievance that actually exists, he falls under the protection of the Directive despite the unfair motive of his report.

Material Scope of Application

The material scope of application is restricted due to the limited legislative competence of the EU. The legal areas in which whistleblower protection must be provided in accordance with European requirements are listed enumeratively in the Directive. The scope of application is limited to violations of EU law in the areas of public procurement, financial services, money laundering and terrorist financing, product safety, transport safety, environmental protection, nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, privacy, data protection, security of network and information systems, EU competition rules, corporate tax rules and violations of the EU's financial interests (Art. 2 of the Directive). In addition, it is possible for national legislators to extend the material scope of application to further areas.

Reporting Channels

The whistleblower has various options for reporting his findings and passing on information. There are the options of an internal report, an external report and a report to the public.

Internal and External Reporting

Appropriate reporting channels must be set up to enable internal and external reporting. Internal and external reporting are basically of equal importance. There is no reporting channel to be given priority by the whistleblower. Nevertheless, internal reporting should be the rule and should be encouraged. In any case, this requires particularly credible and trustworthy internal whistleblowing systems.

Establishment of Internal Reporting Channels

Requirement to set up Internal Reporting Channels

To enable internal reporting, a reporting channel must be set up within the company. Companies with at least 50 employees are obliged to set up whistleblowing systems. For companies with fewer employees, national legislators are free to implement the directive.

Requirements for Reporting Channels

The reporting systems to be set up by companies must meet certain minimum requirements. Unauthorized persons must not be able to gain access and the identity of the whistleblower and third parties must remain protected (Art. 16 of the Directive). The company must acknowledge receipt of the report to the whistleblower within seven days and inform the whistleblower within three months at the latest of how the report was handled and what measures the company has taken (Art. 9 of the Directive). Appropriate facilities are required to ensure that this deadline is met. When setting up a reporting channel, data protection aspects in particular must also be taken into account.

The United States Department of Justice's Guidelines for an Effective Whistleblowing System

The United States Department of Justice ("DOJ") guidance provides important insights into how the DOJ will assess corporate compliance programs. This also provides further requirements that companies should consider when implementing their whistleblowing systems. Corporate compliance systems, according to the DOJ's guidance, should specifically take into account the company's specific risks, which include, but are not limited to, its location, industry sector, competitiveness, potential customers and business partners, transactions with foreign governments, payments to foreign officials, use of third parties, or charitable and political donations. Companies should also establish a hotline that allows employees to report allegations of a violation of the code of conduct or company policies and to file complaints. Companies should generally offer employees the opportunity to report suspected misconduct confidentially or anonymously. The principles of the DOJ guidelines are also likely to be implementable against the background of the EU Whistleblowing Directive, so there is an opportunity here to design whistleblowing systems in line with European and U.S. requirements.

Requirement to Establish External Reporting Channels

Member States are obliged to establish external reporting channels. According to Art. 10 of the Directive, Member States must designate the competent authorities that are authorized to receive reports, provide feedback on them and take appropriate follow-up action. The reporting channels and reporting procedures to be established must meet a number of requirements. These requirements include, in particular, an independent, autonomous organizational form in the form of an organizational separation from general information channels of the authority, ensuring the completeness, integrity and confidential treatment of the reports received, including their permanent storage, as well as the performance of a comprehensive public information function with regard to the legal framework and general procedures. In addition, responsible persons are to be appointed whose tasks consist primarily of receiving and investigating tips and providing continuous feedback and notification of the status of proceedings to the whistleblower.

Notification to the Public

Reporting to the public, for example in the form of reporting to the press, is only protected as ultima ratio. Reporting to the public is subsidiary to internal and external reporting. According to Art. 13 and 15 of the Directive, a whistleblower shall only be covered by the protection regime of the Directive if he or she has initially made the report internally or externally to the competent authorities, but no appropriate measures have been

taken by the company or the competent authorities within the standardized time limits. In addition, publication of the information is to be permitted if the whistleblower could reasonably assume on the basis of reliable indications that either the reported misconduct poses an immediate or obvious threat to public safety, i.e. an emergency exists, or publication is necessary to avert irreversible damage, or the whistleblower would face reprisals if he or she were to report the matter to the competent authorities, or if, due to the circumstances of the individual case, no remedy is to be expected if the matter is reported internally or externally to the authorities, since the authority itself is involved in the violation or evidence could be destroyed.

Protective Measures

Comprehensive regulations are in place to ensure the protection of whistleblowers.

Protection against Reprisals (Art. 19 et seq. of the Directive)

In order to protect the whistleblower, suspension, dismissal, downgrading or denial of a promotion as well as the non-renewal of a temporary employment contract are prohibited, provided that these measures are attributable to the whistleblower's tip-off.

Reversal of the Burden of Proof to the Detriment of the Company (Art. 21 of the Directive)

A reversal of the burden of proof to the detriment of the company has been newly standardized. A whistleblower no longer has to prove that a labor law measure was taken as a result of the whistleblowing. Instead, the company affected by the report must prove that it is not an unlawful reprisal.

Sanction (Art. 23 of the Directive)

The Directive requires Member States to establish effective, proportionate and dissuasive sanctions for natural and legal persons who prevent or attempt to prevent the reporting of possible violations, impose reprisals or disadvantages pursuant to Art. 19 of the Directive on protected persons or unjustifiably disclose the identity of the whistleblower.

Implementation by the National Legislator Protective Measures

The requirements of the directive need to be specified by the respective national legislator. The deadline for implementation has now expired.

Need for Action by Companies

The new regulations will pose challenges in particular for companies that have not yet set up reporting systems. Appropriate facilities must be implemented and persons must be entrusted with the corresponding tasks. The above requirements for setting up a reporting system must be taken into account. Companies that already have reporting systems in place must check whether the existing systems are adequate or whether there is a need for adaptation.

The internal reporting channel should be easily accessible to the whistleblower. Companies must therefore inform their employees in advance about the introduction of such a reporting system. In addition, companies must ensure that due employees are trained in the responsible handling of reports. This applies not only to employees who work directly in the reporting system, but also to employees in management functions or in human resources. This easy permissibility is important because it reduces the risk that whistleblowers will report a grievance to the authorities instead of using internal reporting channels.

Shifting the burden of proof in sanctioning a whistleblower (for example, in the form of being passed over for promotion, a negative performance evaluation, or even termination) may, in practice, create the risk that employees will attempt to gain additional (termination) protection or an improved starting position for disputes over promotion issues by filing a timely and potentially non-rebuttable whistleblowing report. In light of this, extensive documentation is essential to demonstrate that disciplinary action is not related to the whistleblowing.