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In this issue

Best practice – Minimum Wage Act – Compliance – HR practice – Data-protection law and compliance – Restructuring law – Pension law – Working Hours Act

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Dear Readers,

Germany is a strong performer in economically challenging times and, therefore, high on the agenda of international investors and companies. In this regard, German labor law is of great importance because it differs in so many ways with other legal systems. This is why we decided to launch the Labor Law Magazine in addition to its sister publication Business Law Magazine.

Labor Law Magazine is also a joint project with the F.A.Z.-Fachverlag, a member of the Frankfurter Allgemeine publishing group, and German Law Publishers. We are joined in this work by the Social & Labor Affairs Committee of AmCham Germany and the Association of Corporate Counsel Europe, our strategic partners, and an advisory board comprised of leading law firms, company lawyers and counsels. We all share a common purpose: covering current aspects of German labor law to make sure you, our readers, stay on top of the latest issues involving Germany and German law.

Starting today, you will receive Labor Law Magazine four times a year if you are a member of one of our partners. Alternatively, you can register HERE to receive the magazine free of charge.

Best regards,

Thomas Wegerich

It can be torture – every day

Works councils in Germany: how to handle them

By Dr. Jan Tibor Lelley, LL.M.

Introduction

Quite often managers ask me: "Are they allowed to do this?" or "How can it be that this is legal in Germany?". A lot of internationally operating companies or companies from abroad think that working with their German works councils feels like torture – every day. And a working relationship based on trust as stipulated in Section 2 of the German Works Constitution Act *(Betriebsverfassungsgesetz)*, which sets the legal framework for works councils in Germany, seems so far away – like the earth from the moon.

It is people business: open communication might help.

What are works councils and trade unions allowed to do in Germany?

The German Works Constitution Act (WCA) stipulates that works councils shall be elected in all business establishments with at least five employees who have voting rights, including three who are eligible for election (Section 1 [1], WCA). All employees who are over 18 years old have voting rights (Section 7, WCA), and all employees who have been employed at the establishment for six months (Section 8, WCA) are eligible for election.

The size of a works council depends on the number of employees in an establishment – the more employees, the larger the works council (Section 9, WCA). In an establishment with 101 to 200 employees, for example, the works council consists of seven members, whereas an establishment with 701 to 1,000 employees has 13 works council members, and so forth. Those elected to a works council serve a four-year term (Section 13, WCA).

Works councils are placed at the organizational level of the establishment, thus at the lowest level in the organization. If the business has several establishments, a central works council is created from the local works councils (Section 47, WCA). Works councils can even be elected as combined works councils within corporate groups (Section 54, WCA). Furthermore, it is possible to elect a European works council in an internationally active company operating with a minimum number of employees in two or more EU member states. The European works council is responsible for representing employees' cross-border interests.

The works council's field of activity: an overview

The German concept of codetermination, which contrasts with the US system, always allows for the presence of trade unions in the office or on the shop floor. Trade unions are, upon notification, permitted to access the company's offices and to lobby for their interests there (Section 2, WCA). Trade unions are also →

allowed to participate in works council meetings and in meetings involving all employees (Section 31 and Section 46, WCA).

The works council's rights concerning social matters form the core of the German concept of codetermination (Section 87, WCA). In this regard, the WCA gives the council an (enforceable) right to codetermination, for example with respect to the organization of working hours, overtime and leave as well as to the introduction and planning of salary plans (bonus programs and assessment systems). Within this context, *enforceable* means that management is prohibited from implementing anything without the works council's approval. One example of this would be the introduction of a new bonus program. A conciliation committee makes a binding decision in the event that management and the works council cannot reach an agreement through negotiations (Section 76, WCA). This conciliation committee and the process is comparable with an internal arbitration panel chaired by a labor judge.

Another important field of activity for the works council includes information on internal transfers and dismissals (Section 99 and Section 102, WCA). Management is obligated to consult the works council before internally transferring or dismissing an employee. In addition, the works council has to be granted the opportunity to deliver an opinion concerning the issue at hand.

The works council also has rights concerning restructuring measures (operational changes, closures, mass dismissals and the like): Management is obligated to at least try reaching a reconciliation of interests with the works council and, thus, an agreement on *how* restructuring should be carried out (for example, the number of employees who would be dismissed).

In an establishment with more than 20 employees eligible to vote, a social compensation plan – an agreement on compensating or alleviating employees' economic disadvantages resulting from operational changes – needs to be negotiated and concluded with the works council (Section 112, WCA).

What does this mean in practical terms …

In times of poor collaboration between the works council and management, the parties both resort to their respective instruments of torture: The works council demands its rights to elaborate communication and involvement in even the smallest day-to-day business issues. It blocks urgent measures concerning working hours, overtime or the new bonus plan dictated by the foreign parent company. All these actions are taken in the name of the right to codetermination in social matters. Management in turn reacts with a sledgehammer. Individual works council members are scrutinized in detail, personal shortcomings in the employment relationship and possible grounds for dismissal are sought out. The works council as such is no longer an intracorporate counterpart and is made into an enemy of employee interests and responsible not only for obstructing the peace within the company through its irresponsible actions, but also for questioning the company's economic survival as such.

Is this really necessary? The Works Constitution Act will remain – regardless if you love it or hate it – a legal reality in Germany for the foreseeable future. As a result, acting in the company's interest entails coming to terms with the Works Constitution Act.

… and how should management act?

But how is this possible to do without giving up legitimate managerial positions and interests? First of all: Do not acquiesce to the works council or any of its external advisers possibly responsible for instigating certain actions. Take a strong stance and draw a clear line that's not to be crossed. It has never proved successful to win over the council by making exaggerated concessions or even by extending preferential treatment to certain works council members. This course of action always backfires: Give someone an inch, and he or she will take a mile, or, in the worst case, will threaten to press charges for disturbing or obstructing the work of the council (which is a criminal offense in Germany). Managers are well advised to remain friendly and firmly meet the works council on equal footing, always keeping the company's and the workforce's best interests in mind.

It needs to be clear that the works council is not per se a (feared) opponent, but initially just the employees' elected representative. It's an entirely different matter if, in fact, the council really represents the majority of employees, however it is worthwhile to establish a sustainable working relationship. Together with the works council, management can achieve many goals. Works agreements – including those cutting social benefits and thus unpopular among employees – have direct and compulsory effect without the workforce's consent. As a conse- →

quence, management is equipped with an instrument that, in these cases, enables implementation of unpopular measures in collaboration with the employees' representatives. This, however, presupposes trust, which does not come cheaply, but rather has to be earned. A works council is only able to trust a strong management when management openly communicates the company's interests. As a result, this has to be the starting point for every collaboration. Anyone who has the works council on his or her side – or at least does not have the council as a (feared) enemy – can quickly make a trusted collaboration a reality for the benefit of the company. <-

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€8.50 for (almost) everyone

Statutory minimum wage in Germany: the concept and initial practical experiences

By Prof. Robert von Steinau-Steinrück

Introduction

After controversial and lengthy political debates, a nationwide statutory minimum wage was introduced on January 1, 2015, by the Minimum Wage Act *(MiLoG)*. As a result of the act, a general gross minimum wage of €8.50 per hour worked applies throughout Germany.

In 2014, not long before the statutory minimum wage was introduced, the pay for 5.5 million jobs in the country was lower than the new gross minimum wage of €8.50 per hour worked. A total of 4.0 million jobs (10.7% of all jobs) are now covered by the Minimum Wage Act. For the remaining 1.5 million jobs, however, the act includes exceptions (see below).

Transition period

During the transition period through December 31, 2017, collective agreements that provide for lower hourly wages continue to apply if they have been declared generally binding or if their application has been extended by statutory instrument according to the Posted Workers Law *(AEntG)* or the Act Regulating the Commercial Leasing of Employees *(AÜG)*. From 2018 onward, the minimum wage will be generally binding. Pursuant to Section 22, *MiLoG*, the statutory minimum wage does not apply to the long-term unemployed during the first six months of a new employment relationship or to interns, children and adolescents who have not completed any vocational training. Interns are exempted under certain conditions, for example when completing an internship that is mandatory due to an education regulation or within the framework of a cooperative educational program that is regulated by law, or if the internship lasts for up to three months and serves as orientation for vocational training or is carried out in combination with it. For newspaper deliverers, the legislation also stipulates a transitional period: in this case through the end of 2016. A minimum-wage commission will check the specific amount of the minimum wage at regular intervals, with the initial review set to take place on June 30, 2016, and to take effect on January 1, 2017. If necessary, the amount will be adjusted and subsequently prescribed by statutory instrument. An equal number of employer and employee representatives as well as neutral experts from academia will be involved in this process. The Minimum Wage Commission has decided that it will use the monthly index of agreed hourly earnings, excluding extra payments, as the basis for the first adjustment to the statutory minimum wage to take effect on January 1, 2017.

The minimum wage *(Mindestlohn)* cannot be waived.

Exception: seasonal workers

The minimum wage is an hourly gross wage that, because of the mandatory nature of Sections 1 and 20, *MiLoG*, must be calculated and disbursed as a monetary consideration. Any remuneration →

in the form of payments in kind, that is, as benefits provided by the employer by way of consideration for the performance of work in a form other than money, is not permitted. The sole exception to this principle concerns the remuneration of seasonal workers to the extent that their room and board may count towards the minimum wage.

A look at the details

The minimum wage cannot be waived. Pursuant to Section 3, *MiLoG*, agreements providing for wages below the minimum wage or restricting or excluding the right to claim the minimum wage are invalid in this regard. Allowances or supplements paid by the employer are considered elements of the minimum wage if their payment does not change the ratio between a worker's output and the remuneration he or she re-ceives for that output. For example, an allowance identified in the employment contract of a worker posted from abroad as the difference between the wage paid in his or her home country and the minimum wage due in Germany, the country of posting, could be taken into account. One-off payments like a Christmas bonus can only be recognized for the period in which they are due (pursuant to Section 2 [1], clause 2, *MiLoG)* and paid (pro rata where appropriate) and then only under the condition that they have been paid irrevocably to the worker. On the other hand, payments that are conditional, for example for working at particular times (for instance, overtime, Sunday, holiday or night work) or work subject to difficult or dangerous conditions (for example, dirt allowances, danger allowances), cannot be taken into account.

The minimum wage is to be paid on the due date as agreed, but not later than on the last bank working day of the month following the month in which the relevant work was performed. An employer's principle obligation pursuant to Section 20, *MiLoG*, includes payment of the minimum wage by the last bank working day (in Frankfurt am Main) of the month following the month in which the work was performed, at the latest, not though payment on the agreed due date. If flexible working hours have been agreed on, specific provisions need to be observed. Foreign-domiciled employers can make use of flexible working hours under the same conditions as German employers.

Documentation obligations

MiLoG also imposes on the employer an obligation to keep and retain records if the company employs minijobbers, employees from any of the industries (construction, restaurant, hotel, industrial cleaning and forestry) listed in Section 2a of the German Illegal Employment Act *(SchwarzArbG)* or temporary workers. The employer must record the commencement, end and duration of the employees' actual daily working hours. The records must be prepared by no later than the end of the seventh day following the day on which the work was performed and be retained by the employer or the temping agency for a minimum period of two years, starting with preparation of the records. Delegating the task of keeping records to the employee is permitted. To simplify the documentation requirement, the German Federal Ministry of Finance issued the German Minimum Wage Recording Ordinance *(MiLoAufzV)*. It stipulates that employers employing workers who solely perform mobile activities and are not subject to provisions regarding specific daily working hours and may allocate daily working hours as they deem fit, only have to record the duration of the work (not its commencement and end). Pursuant to Section 1 of the Ordinance on Minimum Wage Documentation Obligations *(MiLoDokV)*, recording obligations pursuant to the Minimum Wage Act (commencement, end and duration of work each day) do not apply to employees whose sustained gross pay exceeds €2,958 a month or whose sustained gross regular monthly pay exceeds €2,000 provided the employer can submit evidence of such payment for the last full 12 months (disregarding any times where there was no entitlement to pay).

Enforcement

To enforce and secure the minimum wage, Section 13, *MiLoG*, stipulates by way of a reference to the provisions in the German Posted Workers Act (Section 14 1, *AentG)* that a principal ordering works or ser-vices will be liable in the event that a subcontractor fails to pay the minimum wage to its employees. The principal is treated like a guarantor who has waived the defense of failure to pursue remedies. The Act does not provide an option for the principal to exonerate itself, so the principal should hedge against such risks by making an appropriate contractual agreement with the subcontractor. <–

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Under suspicion

Preventing pseudo self-employment: do's and don'ts for multinationals

By Dr. Thilo Mahnhold and Dr. Daniel Klösel

A multinational challenge

Whether in Germany or the United States, contracting models have recently been receiving widespread attention in both the media and the legal arena. The global transportation network company Uber just settled a class-action employee misclassification suit in California by paying $100 million to 385,000 Uber drivers. And FedEx, to name another multinational, has to deal with several contractor misclassification suits (of package drivers) in the United States.

Part of the team? It depends on the daily business with the contractor.

The situation in Germany is no less controversial. The classification of Ryanair pilots as contractors has just been questioned, and even public prosecutors have picked up the Ryanair case. Daimler has agreed to pay an administrative fine of €9.5 million for the misclassification of its test drivers. New laws with the intention of further restricting the hiring of employees and regulating contracting models are now on the way. Crowd work and other forms of "work on demand" are the next major topics German politicians, trade unions and other stakeholders are focusing on.

To make a long story short, contracting is under suspicion and is full of pitfalls: not only in Germany, but also in other European countries and in the United States. A new challenge for multinationals' contractor compliance – established in light of CSR and fraud prevention – is making its mark!

What is the motivation for prevention?

To understand the significance of and motivation for prevention strategies, it should be sufficient to apply a legal perspective in taking a brief look at the large variety of liability risks arising from a misclassification.

- *Employment law:* In the event of misclassification, the very strict German employment law standards would →

apply to the relationship with the purported contractor. This includes, but is not limited to, termination protection and the application of any employment-law statutes governing working time, sick pay, vacation, maternity leave and the like.

- *Social security law:* In addition, the company would also be obliged to pay both the employer's and the employee's social security contributions for up to approximately 40% of the contractor's gross salary (up to the contribution assessment ceiling) retroactively for up to four years (should the employer act deliberately, for up to 30 years).

- *Tax law:* Furthermore, the company could be generally liable for outstanding income taxes the contractor may not have paid in the past. In addition, VAT might also be a major issue: Someone who is in truth an employee is neither authorized to show VAT in his or her invoices nor is she or he entitled to deduct input tax.

- *Criminal law:* There is a criminal law provision that stipulates that company's representatives who withhold employee contributions to the social security system could face incarceration of up to five years or a fine if found guilty, regardless of whether or not wages or salaries are actually being paid.

» **The wording of the contract and the will of both parties to enter into an independent contractor relationship can, however, only provide a preliminary orientation.** «

Aside from these legal consideration, protection of a company's reputation is an important goal when a multinational tries to prevent pseudo self-employment. Companies have to anticipate they might be the subject of negative media attention if they retain "illegal" employees. Another aspect that especially multinationals should consider is the fact that a negative media campaign could quickly spread across national borders, possibly making it harder to enter new local markets. Uber, for example, is facing serious difficulties in developing its European business.

What does pseudo self-employment mean?

The German statutory law, and even case law, do not sufficiently define selective criteria for distinguishing between "dependent" employees and "independent" contractors. For this reason, all relevant indications for dependent or independent work performance must be checked and evaluated in an overall assessment process. The following circumstances could indicate pseudo self-employment:

- Probably the strongest indication of pseudo self-employment is the employer's right to issue directives on both the place and time as well as the details of the contractor's work.

- Another important indication is the involvement of the pseudo self-employed contractor in the employer's organization insofar as he or she performs services alongside regular employees and/or uses the employer's facilities for his or her work.

- Pseudo self-employment is also indicated if the contractor is obliged to render the services in person. Here, the contractor's use of his or her own employees or those of third parties is a particularly strong indication that he or she is self-employed and will be the decisive indicator in most cases.

- Another major factor within the context of an overall assessment is the extent of the contractor's work performance in comparison with regular full-time and part-time employees.

- Further elements indicating either employment or pseudo self-employment include: (a) the employer has regular employees who perform the same or similar work, (b) restricted liability in the case of default in performance, (c) absence of typical features indicating entrepreneurial activity, (d) inclusion in the vacation and substitution plan.

In summary, it can be said that the agreement on and the organization of the contractor's services within the daily business are relevant to the overall assessment process. The wording of the contract and the will of both parties to enter into an independent contractor relationship can, however, only provide a preliminary orientation. The ultimate deciding factor is the organization of the contractor's work performance within the day-to-day business.

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Misclassification a new challenge for contractor compliance

So what can one do? In particular, those companies that outsource core functions of their business will easily face severe compliance risks if they do not review their business relationships with contractors in light of the aforementioned criteria. Due to financial exposure, the risk of criminal liability and threats to the company's image, it is merely a logical step to integrate contractor misclassification risks into a multinational's compliance strategies. New laws such as those currently being planned in Germany, modern forms of labor such as crowd work and scrum, or specific conflicts with contractors can serve as driving factors to assess contracting models from a compliance perspective.

The outcome of such initiatives depends very much on the risks, the degree of contractor involvement in the company and the specific compliance approach of the respective multinational. Accordingly, a risk assessment must be the starting point for such compliance strategies. Of course, the contracts with contractors are the first ones that will need to be assessed and will typically provide the first source of surprises: In some cases, written contracts will be missing or the contracts will be comprised of wording that is typically used to describe the duties of employees.

The next step – more challenging and, in the end, more decisive – is assessment of the everyday business with the respective contractors. Even a perfectly drafted contract will not prevent misclassification if the contractor is treated as an employee in fact. Tools to detect such deviations are, for example, interviews, visits to sites in order to understand the collaboration interfaces with contractors, or training measures. Risk prioritization can play a key role in making such risk assessments feasible and reasonable.

Key elements of contractor compliance

The final step is to consider the question of what compliance measures need to be taken after the risk assessment. The answer is simple: There is no-one-size-fits-all approach. Drawing from the risk assessment, the respective compliance tools will have to be customized. There is a wide range of potential measures, and the discussion on CSR and fraud prevention teaches the lesson that it would be short-sighted to limit this approach to the principal. The higher the compliance risk and the more complex the organization of the contractor, the greater the interest is in including the contractor in any compliance strategy. Internally, ongoing information about the do's and don'ts of collaboration with contractors is a typical component of any compliance strategy, at least for employees who work at interface points with contractors, regular training is another.

Furthermore, multinationals are well advised to establish effective contract and compliance management. Potential cases of misclassification should be investigated, solved and documented. Contracts should be in writing and documented comprehensively. If appropriate and in correlation with the risk assessment, such contracts could also oblige the contractor to execute compliance measures in relation to his or her own employees. This could comprise the duty to inform and train at least key personnel on an ongoing basis about their do's and don'ts and their role as employees of the contractor and not of the principal. Before contracting with new third parties, contractor due diligence should be executed. And especially in the case of outsourcing a company's own core functions, organizational measures limiting and controlling interfaces between the employees of the principal and the contractor can make sense.

All in all, such strategies are no guarantee that cases of misclassification will never occur. But these kinds of strategies can serve as important tools for preventing and mitigating risks and would definitely serve to build a strong line of defense if the public prosecutor or the tax and social security authorities knock on a multinational's door. <–

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At arm's length

The Internet economy: opportunities and risks with freelancing

By Dr. Anja Mengel, LL.M. (Columbia)

Introduction

The Internet economy is virtual, fast and decentralized. And it's global, too. Freelancers play an integral part in the operations of many Internet businesses as they, on the upside, usually deliver qualified, specialized and fast services while relieving companies of the burden of accumulating too much headcount too early. However, in Germany's strictly regulated HR environment and labor market, there are also very significant downsides if freelancing is not properly set up and carried out: German authorities regularly review and inspect all businesses located in Germany to determine if freelancing rules have been correctly applied and will claim heavy retroactive liabilities and fines from businesses where freelancers are, in fact, treated as dependent employees and are therefore entitled to employee social security benefits. As a general rule of thumb, at least in lower income ranges, the additional payments required for "failed freelancing" can easily amount to about 70% to 100% of the original fees paid and usually have to be made retroactively for four years, regardless of any potential personal civil law and criminal law liabilities incurred by management.

New job profiles, new legal judgment?

As a result, models that heavily rely on freelancing need to be reviewed carefully. In this respect, Internet businesses are up against the rather traditional models and criteria used by the authorities and courts to make a legal distinction between dependent employment and freelancing. Diligent presentation of the new types of services provided and used within the Internet economy does, however, often pay off with new case law accepting new types of freelancers. This is reflected in a recent court decision about a "scrum coach" and another about a "web designer" collaborating on specific but long-term projects involving further development of the website of a large German Internet B2B/C2C platform. The social security authorities had found the services to have been carried out by employees mainly due to the fact that the contractors were often present at →

Freelancers: free to determine their own schedules and project work.

internal team meetings and also "wrote code" on the business' own servers, but the court of first instance had reached a different conclusion. It accepted the notion that a software developer who specializes in being a coach for the "scrum method" is much less part of the internal team of developers than the comparable external business consultant who advises on a restructuring project for a while.

The practical view: relevant criteria and ...

Still, these cases would have most likely turned out negatively for the businesses had the freelancing contracts not been made with specialists in their field who had their own businesses for some time already and could provide an impressive track record of (other) former clients as well as demonstrate they had use of their own office facilities away from the project's business. Under German law, it is also essential that the freelancer not be obliged to work set hours on a daily, weekly or monthly basis and is, from the outset, free to determine the amount and scheduling of the time he or she assigns to one project. The freelancer must provide the equipment required to carry out assignments, including, for example, a laptop, computer, phone, standard software and the like, as well as his or her own office facilities. In this respect, reimbursing costs should also be avoided, and the freelancer should calculate the costs that need to be covered by remuneration.

While a lot of the relevant criteria can be addressed in the freelance contract, business liabilities often result from the noncompliant practice of carrying out the contract over time. It has therefore proved to be very useful to hold training sessions at the beginning of a new project or for an event to be set up for a business involving freelancing followed by regular compliance reviews and updated training for both HR professionals and the line managers or project coordinators who act as the point of contact with the freelancers. The general idea must be that a freelancer is to be dealt with "at arm's length," much like an outside counsel or architect, and not like a "team member" when it comes to all kinds of daily issues such as organizing meetings, setting deadlines, reporting and participating in social (after-work) events as well as benefits like gym discounts and the like.

... the problem of a "must-be employee"

One difficult issue for businesses participating in the Internet economy involves business models that feature a special type of software or app or website backend to be used by freelancers. While such tying in through the software is often simply impossible to avoid from the business point of view, the German authorities and courts have traditionally considered this a decisive criterion for considering the freelancer a "must-be-employee" – that is, a situation where freelancing is made simply impossible by a required daily "integration" concerning software and IT. The courts have, however, recently accepted that a web designer writing code on the business' servers for reasons of data volume and secrecy could in this respect be compared to a traditional freelance plumber required to work on the pipes "in-house" without jeopardizing his or her freelance status – provided other freelance criteria are fulfilled.

While these recent case law developments are encouraging for Internet businesses in Germany and will make it easier to defend new freelancing models emerging from the virtual economy, German law always requires an assessment be made on the basis of the various circumstances of the individual case and is averse to generalizing case law too lightly. It is therefore (still) up to each business to regularly set up and review – and possibly correct – its operations for social security compliance. <–

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Avoiding data-protection pitfalls

E-mail and Internet in the workplace: crystal-clear rules are needed to handle an area strewn with stumbling blocks

By Guido Zeppenfeld, LL.M.

From a legal perspective, employee usage of an employer's IT systems at the workplace is a tricky area. While employers certainly do have a vital interest – plus a statutory obligation – to ensure compliance when its employees use company-owned electronic communication systems, including the Internet, monitoring and controlling rights are heavily restricted by data-protection laws and the individual employee's privacy rights. In practice, there are many pitfalls employers need to be aware of. On January 27, 2016, the Conference of Independent Federal and State Data Protection Authorities in Germany issued written guidance on the limits of control of e-mail and other Internet services in the workplace. Such guidance may help to avoid some of the major risk faced by employers. It contains detailed recommendations for employers, both public and private.

In a nutshell, the data protection authorities ("DPAs") clearly emphasize their restrictive position regarding the employer's control rights. While the guidance is not legally binding, it provides a useful indication of the DPAs common views and likely approach to specific issues regarding data protection in connection with e-mail and Internet usage in the workplace.

When it comes to the legitimacy of an employer's monitoring and control measures, the principal question is whether the employer allows – or merely tolerates – private use of the Internet or of the company's e-mail system. If it does, the employer is, according to the DPAs, to be considered a provider of telecommunication or telemedia services. As a result, the employer has to comply not only with the Federal Data Protection Act *(Bundesdatenschutzgesetz – "BDSG")*, but also with the regulations of the German Telecommunication Act *(Telekommunikationsgesetz – "TKG")* and the Telemedia Act *(Telemediengesetz – "TMG")*. In this case, the employer is subject to the legal principle of the secrecy of telecommunications, the violation of which may even constitute a criminal offence

Private use prohibited – broader options

If the employer prohibits the use of the Internet and company e-mail for private purposes, the employer may, in principle, conduct random checks to ensure compliance. According to the DPAs, these random checks are to be conducted anonymously – specifically, that is, without the employer knowing the IP addresses of the respective users. A personalized, full check will, in the eyes of the authorities, only be permissible in the case of a concrete suspicion of a violation connected to a criminal offence committed by the employee. Even in this case, checks need to be commensurate. In addition, the most privacy-friendly methods to limit Internet use are to be chosen. Blacklists – that is, lists that block certain websites – or white lists – that is, lists that allow access only to particular websites – are recommended.

If use of the company e-mail account is limited to business purposes, the employer may, in principle, only take notice

Handle with care. Data-protection-rules should always be considered.

of the content of incoming and outgoing business e-mails if they are forwarded by the respective employee. Automatic forwarding settings, however, are only permissible if the employee is absent. To comply with the principle of commensurability, it is recommended that this be restricted to situations where an out-of-

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office note is insufficient to protect the employer's business interests.

The DPAs take the view that the employer will only be allowed to access sent and received e-mails insofar as it is necessary for business purposes. Even if private use of the e-mail account is forbidden, the employer may not take notice of the content of an e-mail as soon as its private nature is recognized. Exceptions can apply when this is necessary to ensure the effective prevention of misuse.

Private use permitted – little leeway without employee consent

If use of the Internet and/or e-mail for private purposes is permitted or tolerated by the employer, the DPAs consider the employer to be subject to the principle of secrecy of telecommunications. This means the employer may only access personal data with employees' explicit consent. Employees may refuse to give their consent without incurring disadvantages related to their employment relationship.

If the employer, for instance, wants to access log data in order to determine compliance with restrictions on private use, it may not do so without obtaining the employee's consent to both his or her Internet usage being logged and to the employer accessing this data. Even where consent has been given, every step taken by the employer needs to be commensurate. Thus a specific check, despite the employee's consent, will only be permitted in cases of concrete suspicion of a crime, a violation of duties under the employment contract, or a violation of an agreement covering private e-mail and Internet use.

Regarding e-mail use, it is recommended to put in place – obviously under due observance of the works council's co-determination rights – specific regulations on the settings of the company e-mail account in case of an employee's absence. If these regulations are not complied with, the employer may access the e-mail account if it is necessary to protect the business interests and if the employee has given his or her prior consent.

If private use is permitted or tolerated, the employer is allowed to access the e-mail account or data files on the Internet without the employee's consent only in very limited circumstances. For instance, access is possible where it is necessary to detect, isolate or eliminate errors or malfunctions.

Special restrictions concerning secrecy agents

"Secrecy agents" are people entrusted with employees' confidential information as part of their work or tasks (for example, members of the works council, company data-protection officers, company physicians or equal-opportunity officers). These individuals enjoy a special relationship of trust with the respective employees. The employer may not access the e-mails of these secret carriers or control their Internet use under any circumstances. This prohibition also applies to communication from other employees with these secret carriers.

Cybersecurity

The Data Protection Conference also points out that the requirements stipulated by data-protection law also need to be adhered to when implementing measures to protect employers' IT systems against computer viruses or to filter unsolicited e-mail.

According to the guidelines, employees need to be informed about a central spam filter in advance. Codetermination rights of the works council also need to be taken into account. Furthermore, the most privacy-friendly defense of should be used. As such, marking suspicious messages is considered preferable to deleting them. In the eyes of the DPAs, employees should be able to decide, as autonomously as possible, how to treat messages addressed to them.

Lastly, filtering and examining private e-mails containing viruses in such a way that enables the employer to see their content should only be allowed insofar as it is necessary to detect, isolate or eliminate malfunctions or errors within the telecommunications system.

Employer's to-dos

The DPAs recommend establishing written policies on business and/or private use of the company e-mail account and the Internet. These policies should contain crystal-clear rules for accessing, logging, processing and controlling e-mail and Internet usage by employees. They also recommend allowing, if at all, only private use of the Internet, including private webmail services, while prohibiting private use of the company e-mail systems and accounts.

This will reduce the risks connected with private use of the company e-mail account. Finally, nonpersonalized, role-related e-mail accounts should be

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set up for secrecy agents (for example, workscouncil@company.com). This makes it easier to exclude these e-mails from control, assessment and processing.

Despite the nonbinding nature of the guidelines, employers are well advised to consider the Data Protection Conference's recommendations and, where possible, adjust their policies and rules related to employee use of company-owned communications systems accordingly. In doing so, compliance with employment law regulations needs to be ensured. In addition, works council's codetermination rights need to be adhered to. It can be expected that the DPAs – both national and regional – will use the conference's guidelines as a common basis for future decision making. <–

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Step by step

Restructuring business operations: you better have your 'storybook' well prepared

By Michael Magotsch, LL.M. (Georgetown), and Kathrin Schlote

Introduction

Restructuring business operations, in particular if connected with a reduction in force (RIF), is often complex and demands careful advance planning. This is especially true for companies having a works council and in cases where the number of affected employees exceeds the collective dismissal filing requirement.

The codetermination right of an existing works council concerning an operational change *(Betriebsänderung)* pursuant to Section 111 of the Works Constitution Act *(Betriebsverfassungsgesetz, BetrVG)* only exists in entities generally having more than 20 employees who are eligible to vote for the works council – agency workers *(Leiharbeitnehmer)* may also need to be taken into account (see Federal Labor Court *[Bundesarbeitsgericht, BAG]* ruling dated October 18, 2011, 1 AZR 335/10). If the thresholds are met, the employer must inform the works council about any planned operational changes that may result in material detriments to the workforce or large portions of it. Such operational changes include:

- Reduction, closure or relocation of the entire operation or of significant parts thereof
- Merger with other operations or the spin-off of operations
- Fundamental changes to the organization of the operation, its purpose or its facilities
- Introduction of fundamentally new working methods or manufacturing processes
- Potentially also: a mere reduction in personnel

Action plan and timelines

The time frame and, in particular, the duration of the information and consultation process with the works council is hardly predictable. Preparatory work serves as a key driver for negotiations →

One step ahead: preparatory work serves as a key driver for negotiations.

with the works council over agreements to balance the interests of the parties and the social plan. This work includes, for example, drafting a "storybook" for the works council to consult and obtain information, notifying the works council about each individual dismissal, preparing mass dismissal filings and so on. Negotiations with a works council can often take many months and easily more than half a year.

This is especially true if the company has more than 300 employees and the works council hires its own adviser – in addition to its lawyer – to review, question and analyze the restructuring plans of the company and to prepare alternative plans pursuant to the second sentence of Section 111 of the Works Constitution Act. Experience has shown that in such an event, the timeline of balance-of-interest negotiations could easily extend over many more months. Employers are well advised to closely monitor "plan B" exercises recommended by "economic experts" who used to be union representatives in their former lives and are hired by works councils. In these circumstances, it is particularly important to have a well-prepared "plan A" storybook presented and rehearsed within the project team at the management level prior to initiating the consultation and information process with the works council.

Implementation of any operational changes, including redundancies, may generally be divided into three phases:

Step one: preparation

This phase comprises thorough initial internal preparation, including planning for the restructuring measures as well as timely and comprehensive information to be provided to the works council.

We highly suggest investing enough time to internally prepare a well-reasoned storybook with all project leaders and devoted team members at the management level of the employer. In practice, it is also very helpful to prepare and draft Q&A lists containing all potential questions and counter arguments in advance in order to ready the – often untrained in legal matters – HR managers and technical experts of the company. The goal must be to proactively address all potential allegations, complaints and claims the works council may raise against plan A so as to convince the works council and all affected staff that the restructuring was well thought through in the first place. The better and more detailed and the more convincing the storybook is, the better the chances of reducing the timeline for negotiations. Actual rehearsals and dry runs with project leaders of restructuring programs have proved very successful in practice.

Step two: information and consultation with the works council

The second phase includes providing timely, comprehensive information and consultation with the works council concerning the intended restructuring measures, potential alternatives to these measures and compensation for the detriments suffered by employees.

>> **The keys to a successful restructuring measure are diligent and comprehensive preparation and timing.** <<

This consultation process usually results in two agreements with the works council: a balancing of interests *(Interessenausgleich)* describing the measure and a social plan *(Sozialplan)* to mitigate the economic disadvantages employees may suffer as a result of the change in operations.

The works council may be able to obtain a preliminary injunction to assert its negotiation rights in several state labor courts (Berlin, Brandenburg, Hessen, Bremen, Hamburg, parts of North Rhine-Westphalia, Mecklenburg-Western Pomerania, Lower Saxony, Schleswig-Holstein and Bavaria). If so, the employer is prevented from dismissing employees or executing any other changes until conclusion of the discussions concerning the balancing of interests. The balancing of interests is intended to determine the particular measures related to the change in operations, the number and scope of affected employment relationships and the way in which the employment relationships are affected.

Should no agreement on a social plan be reached, a conciliation committee proceeding needs to be initiated that can bindingly decide on the social plan – but not on the balancing of interests. The means offered in a social plan depend on the concrete circumstances; typical forms of mitigation are, for example, severance payments in cases of termination or payment of moving costs in cases of relocation. Also, mere redundancies may require preparation of a social plan. This is, however, only the case if the thresholds pursuant to Section 112a of the Works Constitution Act are met.

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Labor unions are allowed to increase pressure on the employer to conclude collective-bargaining agreements on social plans that satisfy employees' demands. In this respect, the labor union may even call upon employees to arrange a lawful strike for a collective social plan *(Tarifsozialplan)*.

Any benefits under a social plan may not be made subject to the condition that employees not file a wrongful dismissal claim. It is only permissible to offer such payments under a separate works agreement. Furthermore, when setting up a social plan, the equal treatment principle, for example, and other regulations against discrimination have to be observed, in particular the German Equal Treatment Act *(Allgemeines Gleichbehandlungsgesetz, AGG)*. In practice, it is often discussed whether severance payments may differ on the basis of the employee's age. Whereas a linear increase is generally considered invalid, age groups or supplement payments on the basis of age may – also according to case law (see, for example, *BAG* ruling dated April 12, 2011, 1 AZR 743/08; *BAG*, ruling dated May 26, 2009, 1 AZR 198/08) – still be valid. The same is basically true for capping the overall severance amounts (see *BAG* ruling dated July 21, 2009, 1 AZR 588/08).

Another considerable question is whether it would be permissible to reduce severance payments for older employees close to the statutory pension start date. Generally, this is considered permissible by BAG (see, for example, *BAG* rulings dated April 23, 2013, 1 AZR 916/11, and March 26, 2013, 1 813/11). It is, however, crucial to note that statutory pensions due to severe disability *(Schwerbehinderung)* may not be taken into account in this regard (EJC ruling dated December 6, 2012, C-152/11).

Step three: implementation

The implementation phase of a restructuring includes, from a legal perspective, inter alia (a) the filing of a mass dismissal with the local labor agency should the respective thresholds be met, (b) information for the works council about each individual termination, (c) the filing of applications with the responsible authorities to obtain approval for terminations and (d) the serving of termination notice letters to each employee.

Concerning the filing of a mass dismissal, employers should be very diligent: Procedural mistakes result in the terminations being null and void. Section 17 of the German Dismissal Protection Act *(Kündigungsschutzgesetz, KSchG)* contains two procedures: providing comprehensive information to and consultation with the works council and providing information to the employment agency. Each proceeding needs to be duly observed for a valid termination (see *BAG*, ruling dated January 20, 2016, 6 AZR 601/14). It should also be noted that according to EJC case law (ruling dated July 9, 2015, C-229/14), managing directors *(Geschäftsführer)* of limited liability companies who hold no shares in the company as well as interns are also to be considered for determining the thresholds.

Conclusion

The keys to a successful restructuring measure are diligent and comprehensive preparation and timing as well as diligent processes with regard to providing information to and consultation with the works council. This particularly also applies to potential mass dismissal filings.

We can't stress enough that initial internal preparation with all involved project leaders and RIF team members at the employer's management level is a key to later success in all negotiations with the works council and – where applicable – union members and their respective advisers.

Employers are also well advised to closely monitor case law in order to not be surprised by recent developments concerning pitfalls, in particular concerning costly discrimination issues under social plans or mistakes in mass dismissal filings. <–

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It's all about the strategic concept

Company pension plans in a low-interest phase: challenges and opportunities for reorganization

By Dr. Lars Hinrichs, LL.M. (Stockholm), and Christine Hansen

Interest rates are at an historic low with no light at the end of the tunnel. Does this mean the end for company pension plans? This article highlights options for and pitfalls to reorganizing company pension plans from a German labor-law perspective.

The starting point: a careful analysis of the status quo

Reorganizing an existing company pension plan is not an easy task. It requires a careful legal analysis of the existing systems to determine if leeway for future changes exists. The instruments offered by German law to implement any changes to an existing plan mainly depend on the legal basis of the plan (individual grant or collective agreement). Pension grants to senior and key employees are often made individually in an amendment to the employment contract. The employer may, however, also grant pensions to all employees or groups of employees collectively *(Gesamtzusage)*. Alternatively, pension plans can be included in collective agreements with a union or, more commonly, with a works council.

The legal analysis also forms the basis for determining the relevant stakeholders and the process. Modifying a company pension plan in a collective agreement requires the involvement of the union or competent works council that concluded the agreement. If agreement on the company pension plan was with the works council, the employer will also have to determine to what degree the works council needs to be involved (three levels exist in Germany: group, company and the local site level). Works council involvement may also be required if the company pension plan was collectively granted to employees *(Gesamtzusage)*. Modifying such a collectively granted pension plan can trigger participation rights of the works council under the German Works Constitution Act (§ 87, Section 1, No. 10 *Betriebsverfassungsgesetz, BetrVG*).

Option one: closing access to plans for new employees

An obvious way to reduce ongoing costs of a company pension plan is closing it to new entries. The decision to close the plan does not require any particular justification. It is not even necessary to consult with the works council about the closure. It will suffice to terminate the collective agreement containing the pension plan with the works council or union while observing the respective notice period. For pension plans based on individual pension grants, the employer will simply not grant any pension to the new employee. Where pensions have been granted to certain groups of employees, the employer should expressly state in the employment contract that he or she will discontinue this practice. Otherwise, employees may argue they are entitled to participate on the grounds of equal treatment or an in-house practice.

Growth in times of drought calls for caution.

Option two: clarifications and closure of loopholes

Another option that does not require particular justification is the clarification of open issues and closure of loopholes in an existing company pension plan. Taking these actions might reduce the employer's risk exposure should a potential ensuing court proceeding see a labor court decide for the (more) disadvantageous interpretation of the unclear provi- →

sion of the pension plan. In the interest of legal certainty, the relevant stakeholders should be included in the clarification process depending on the legal basis of the pension plan. Should the pension entitlement be set forth in a collective agreement, the employer should include the clarification in a supplemental agreement with the applicable works council or with the labor union as the case might be.

Areas typically affected by such clarifications include:

- Age for statutory pension entitlement: Old pension entitlements granted prior to the German Annuity Adaptation Act *(Rentenanpassungsgesetz)* in 2007 still often refer to the age of 65 as the relevant age for old-age pension entitlements. Due to the increase in the statutory pension age to 67, employers generally have an interest in (continuously) linking the company pension entitlement to the statutory pension age. The German Federal Labor Court *(Bundesarbeitsgericht, BAG)* stated in a decision in 2012 that these old-age pension entitlements need to be interpreted in such a way that employees are only entitled to the company pension plan when reaching the statutory pension age.
- Intransparent valuation parameters for the calculation of the pension entitlements: Intransparent valuation parameters can often be found in defined benefit plans that do not clearly define the remuneration components to be considered as basis for the calculation of the individual pension benefit.
- Age thresholds for waiting periods violating the General Equal Treatment Act *(Allgemeines Gleichbehandlungsgesetz, AGG)*: According to the jurisdiction of the German Federal Labor Court, age thresholds as a prerequisite for pension entitlement have to be considered a violation of the General Equal Treatment Act and therefore invalid if employees less than 50 years old are excluded from participation in the company pension plan. Modification of the age threshold in accordance with the General Equal Treatment Act ensures the future validity of the plan.
- Reduction of premature pension benefits: According to § 6 of the German Company Pensions Act *(Betriebsrentengesetz, BetrAVG)*, beneficiary employees are generally entitled to premature payment of the pension benefits once they are entitled to the statutory pension without deductions – even if the company pension plan does not contain a respective provision regarding entitlement to such premature payment of the company pension benefits. It is therefore recommended that companies include an explicit provision regarding the reduction of premature pension benefits in the company pension plan.

Option three: financial compensation for pension entitlements

The employer may seek to rid him- or herself of the burden of low interest rates by paying lump sum compensation to employees eligible for a company pension. The German Company Pensions Act (§ 3, *BetrAVG)* does not generally permit paying off employees once employment has come to an end. Active employees, on the other hand, may agree to receive financial compensation for waiving their pension entitlements provided the waiver is not in any way connected to a termination of the employment relationship. A waiver of vested pension entitlements in a termination agreement is therefore invalid.

In exceptional cases, German laws permit paying off company pensioners. Such an exception may, inter alia, apply to:

- Company pensioners who started receiving their company pension prior to January 1, 2005, and who agree to financial compensation
- "Petty" pension entitlements or small amounts that can be paid off by the employer without obtaining prior consent
- Pension grants to board members of a German stock corporation *(Aktiengesellschaft)*, according to a decision of the German Federal Labor Court dating back to 2009. Whether the same applies to managing directors of a German limited liability company *(Gesellschaft mit beschränkter Haftung)* has not yet been decided but does seem consequential.

Option four: suspending pension adjustments

Under the German Company Pensions Act (§ 16, *BetrAVG)*, an employer is obliged to adjust regular pension benefits every three years. The adjustments are generally dependent on the development of the consumer price index or the net salaries of active employees.

There are several exceptions to this rule, though. The employer may opt for →

an annual flat adjustment of 1%. More interestingly, the employer may even be entitled to partly or fully suspend pension adjustments if the economic situation of the company does not permit such adjustments. The employer must, however, follow a certain process that includes providing proper information to the company pensioners about the suspension and the economic situation of the company. In particular, the employer is required to provide comprehensible documentation of the company's economic performance.

Option five: modification to the benefit plan

The legal requirements for any modification to the benefit plan will depend on the legal basis of the company pension plan and the company's economic situation: Modifying an individual pension grant generally requires the employee's consent. The German Federal Labor Court took the view that an agreement resulting in a reduction to future benefits must meet the requirements for paying financial compensation (§ 3, *BetrAVG)*. Paying the employee one-off compensation is therefore only permissible while the employee is still "on board." Reducing the pension entitlements of former employees or ongoing pension payments is therefore generally not an option (for exceptions, see option three above).

Some individual pension grants contain language referring to a collective agreement or allowing a modification through such a collective agreement. Where this is the case, the employer may seek to negotiate a more favorable agreement with the works council. The same applies when the pension plan has been collectively granted to all employees or a group of employees *(Gesamtzusage)*. The German Federal Labor Court held in 1986 that these collectively granted pensions can be modified by an agreement with the works council if (and only then) the modified plan is generally not less favorable to employees.

Any modification to a collective agreement with the works council has to be proportional. The German Federal Labor Court developed a three-step test for proportionality specifically for company pensions in order to protect the legitimate expectations of employees:

- Intervention into vested rights protected against insolvency: Only mandatory reasons can justify intervention into vested rights. The German Federal Labor Court accepted such interventions only in exceptional cases, such as an employer's preinsolvency situation.

- Intervention into the vested amount that includes a prorated dynamic increase: Pension entitlements that are calculated on the basis of the amount of remuneration most recently earned by the employee generally contain a dynamic increase that depends on the future development of the calculation parameters. An intervention into the dynamic (which usually means a lower future increase) must be justified with good reasons. The employer must generally demonstrate that the existing pension plan jeopardizes the continued existence of the company based on a forecast period of at least three years.

- Intervention into the increments that only depend on (continuous) employment with the employer: For interventions into employees' rights that only relate to the increased value of the pension entitlement due to continuous employment with the employer, the employer needs to demonstrate objective reasons for the modification to the pension plan and to explain the alternatives to the intervention as well as the reason for their omission.

Summary

A successful cost-effective reorganization of company pension plans depends on proper consideration of the applicable legal parameters. At the same time, a legal assessment has to follow the employer's strategic and economic decision about continued execution of the company pension plans. The legal parameters establish the proper instruments for the reorganization, but are no substitute for the parameters that define the strategic concept. <–

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Is travel time always working time?

Working Hours Act versus payment obligation: an overview

By Dr. Thomas Barthel and Roman Parafianowicz

Working time according to the working Hours Act

Despite its practical importance, the question of whether and to what extent travel time is working time is not absolutely clear. In practice, the legal situation is not transparent, mainly due to different interpretations in case law with regard to public working-time law (Working Hours Act) on the one hand and paid work on the other.

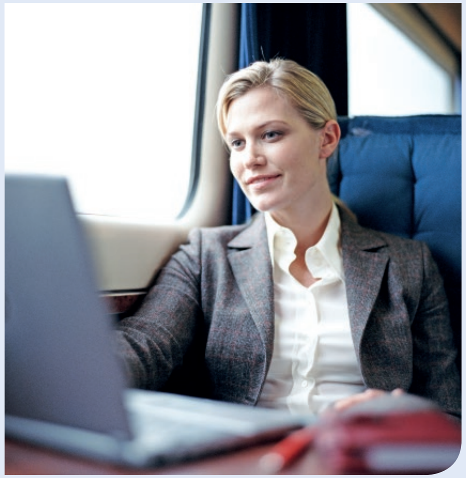
In order to protect employees, the Working Hours Act *(Arbeitszeitgesetz, ArbZG)* contains limitations for maximum daily and weekly working time.

The Federal Labor Court *(Bundesarbeitsgericht, BAG)* does not consider an employee's travel time from a private home to a permanent place of employment and back to be working time within the meaning of the *ArbZG*.

With regard to business trips, *BAG* distinguishes among three types of time: travel time for an outward and return journey, working time in the strict sense, and the waiting period at the destination and after finalization of the actual work.

The question of whether the performance of work as such must be regarded as working time within the meaning of the *ArbZG* is easy to answer: Of course it does.

The question of whether the waiting time at the destination that occurs before and after the actual work and travel time (for which the employee has not been given any instructions on how to use such time) is considered working hours within the meaning of the *ArbZG* cannot be answered that easily. *BAG* denies this for travel time during which employees do not need to drive themselves and have not been instructed by their employer to, for example, read and write texts or e-mails, prepare or follow up on appointments, etc. According to *BAG*, this is even truer for the waiting period at the destination as employees are even less restricted in what they do during such waiting periods.



Wait and see? A contractual agreement for travel times is strongly recommended.

Degree of stress as decisive factor

According to *BAG*, the crucial factor is the degree of stress employees are under ("stress theory"). Unless the employer has instructed an employee to use travel and waiting times to perform work comparable with actual work in the strict sense, for example, editing files or e-mails or preparing or following up that otherwise would have been performed at his or her desk on the business premises, the health and safety of such an employee would not be endangered by exceeding the daily maximum working time of 10 hours as provided by the law (according to *BAG)*. Employees may prefer to deal with private matters, relax or even sleep during business travel if they have not been instructed to drive a vehicle themselves. They would only be asked to "spend some leisure time," *BAG* argues.

If, however, the employer instructs an employee to perform work in the strict sense or duties comparable with normal work during travel and waiting times or to drive a vehicle, travel and waiting times have to be regarded as working time within the meaning of the *ArbZG*.

The (perhaps surprising) outcome is that certain periods are considered working time for the driver but not for the passenger. This is of crucial importance for the next day's rotas in terms of rest periods because the prescribed statutory rest period before the start of work →

on the following day begins for the driver when he or she parks the car but for the passenger had already started during the trip.

As a result, the question of whether these times are working times within the meaning of the *ArbZG* should preferably be answered affirmatively because breaches of the *ArbZG* constitute administrative offenses, in certain cases even criminal offenses (§§ 22, 23 *ArbZG)* and may lead to exclusion from participating in public procurement processes.

Payment for Travel and Waiting Time

The legal situation regarding payment for travel and waiting time (paid working time) differs from the above principles concerning the classification of time as a working period under the *ArbZG*.

According to *BAG* case law, the following applies if no individual contractual arrangement regarding the classification of travel and waiting times as working time has been made and no definition exists in a relevant collective-bargaining or work agreement.

Travel and waiting times within the agreed regular daily working hours must be paid unless otherwise stipulated.

Details on arriving at this result will not be discussed at this point as there are a number of different approaches that lead to the same result.

BAG's assessment of the issue of a payment obligation for travel and waiting times outside the agreed regular daily working time is different. *BAG* holds that such time must be remunerated only if remuneration has expressively been agreed on or, if no agreement exists, in line with § 612 (1) of the *BGB* (Civil Law Act), can be expected under the given circumstances. There is no general principle to the effect that all travel and waiting times beyond the agreed normal daily working hours must be paid.

Without an agreement, travel and waiting times outside the agreed regular daily working hours only have to be paid for activities in the interest of the employer. Nevertheless, not all activities in the interest of the employer have to be compensated. These must be paid under the circumstances. The judicature's approach to answering this question also draws from the stress theory of working time legislation within the working hours act. If employees are free to decide what to do during their travel and waiting times (except the fact that they are passively traveling in a car, train or plane), such time is not remunerated working time. The situation is different, for instance, if an employee has been instructed by the employer to drive a vehicle by him- or herself.

According to § 612 (1) of the *BGB*, what can be expected under the circumstances also depends on the employee's standard remuneration, which could possibly cover a certain amount of travel and waiting time in addition to regular daily working hours. There are, however, no fixed thresholds. In their decisions, the courts have sometimes held that even employees in higher but not necessarily executive positions have to accept a certain amount of traveling in their leisure time. It was further ruled that an employee does not have to be additionally paid for two hours of travel per day. The use of such terms as "higher position" and "above-average salary" in court rulings without further definition proves that no legal certainty can be expected.

Practical advice concerning payment for travel and waiting time

Due to these uncertainties, a contractual agreement concerning the remuneration paid for travel times is strongly recommended. The principles described above can be waived through individual or collective agreements; that is, even if remuneration would be expected under the circumstances, a different agreement can be reached within the limits of a higher-ranking principle of law.

Especially in cases where employees have to travel frequently, a practical need exists for an explicit provision that defines paid travel and waiting times that go beyond the agreed regular working time and travel and waiting times covered by the employee's salary. The law allows for employer-friendly rules. In terms of motivating employees to travel on behalf of the employer, a balance should be found between what is legally permissible and paying for all travel times in full. <–

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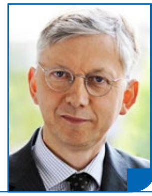

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