

Germany – New requirements for time recording

On 14 May 2019, the European Court of Justice (“ECJ”) issued a ruling in Case C-55/18 with significant implications for all companies. Member States will have to require employers to set up an objective, reliable and accessible system to measure the daily working time of each employee. Already, concerns are being raised that the widely practised trust-based working time will be abolished and/or that this heralds the end of working time flexibility. In view of the increasingly agile working world, the decision seems at first glance to be a step backwards. Is there a threat of a return to the previous systems of time clocks?

Background to the decision

A Spanish trade union sued Deutsche Bank for setting up a working time recording system. Under Spanish law, the employer is not obliged to record time in general, but only “overtime”. However, in practice, this regulation is often not effective. The ECJ followed the Advocate-General and declared the Spanish regulation contrary to European law. In particular, it saw a violation of the Charter of Fundamental Rights, which grants every employee the right to limit maximum working hours. A system for recording working time was found to be necessary because it was the only way the number of hours worked and overtime hours could be reliably and objectively measured. Without such a system, the employee would also not be able to assert his rights, for example to overtime pay.

What is the current legal situation in Germany?

The legal situation in Germany is comparable: so far, only the working time exceeding the maximum daily working time of eight hours has to be recorded. Contrary to widespread misconceptions, this obligation applies to all working time models, including trust-based working hours, and to most employees. It should be noted, however, that local authorities sometimes demanded a minute-by-minute working time record even before the ECJ ruling.

Impact of the decision

The decision has far-reaching consequences. It is very likely that the working time documentation regulation of German working time law violates European law and thus becomes inapplicable – similar to German vacation law. Company practice must be adapted if working time is insufficiently documented. Works councils are likely to insist on the increased documentation requirements. It is still possible that employees involved in working overtime may be able to do so and claim associated overtime pay in a simplified manner in the absence of a working time recording system. The European Court of Justice also expressly speaks of a need for companies to facilitate the production of evidence in the enforcement of employees’ rights.

Against this background, the following should be kept in mind:

- 1 Companies should create clear working time structures**

Working time compliance will become more important in the future. The ruling forces the creation of a system, i.e. the provision of structures that prevent and punish working time violations. Here, however, there is room for manoeuvre. The judgement states that it is up to the member states to decide how they want the system to work. What is needed is a clear structure in which there are regulations and processes for recording working hours and, above all, for their review by managers. Every company should take into account its own and industry-typical risk situations and individual activities. For example, training measures will have to enable employees to recognise and prevent violations of working hours. A hands-on approach à la “informal self-writing” is thus likely to become legal history.
- 2 Delegate correctly and properly**

Working time compliance not only forces compliance with working time law, but also with related legal areas, such as data protection (particularly employee control) or health protection (particularly mental stress at work). Due to the many and varied duties, the delegation of duties – such as compliance with working time limits – to reliable and competent employees is becoming increasingly important. According to the ruling of the ECJ, the employer may also leave the recording of working hours to the employees. However, if an employer notices that this does not work, steps must be taken to intervene. Many companies already have delegation models, but these often only exist on paper and therefore might not be sufficient.
- 3 Avoid liability traps**

Anyone who has neglected working time rules so far must now expect fines or punishable offences – in addition, profit skimming or register entries threaten. It remains to be seen whether further and stricter sanctions will be imposed in future if a working time recording system is not introduced. The decision of the ECJ should encourage authorities and even competitors throughout Europe to take a closer look – in this respect many companies are sitting on a time bomb. In many companies the weekly maximum allowed working time of 48 hours is already reached on Thursday mornings. Risks of fines or criminal liability should be quickly identified and resolved.

One preliminary conclusion can be drawn: we will not be returning to the time clock system of the past. Documentation obligations existed before the ruling of the ECJ. However, companies would be well advised to consider the effects of the decision now, in particular the introduction of a working time compliance system.

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