

## Employment Germany

May 2019

### **ECJ responds to "Work 4.0" with "Ruling 1.0": In future, Member States will have to require companies to fully document employee working hours**

The Luxembourg judgment in Case C-55/18 applies to all companies and employees in Germany, regardless of whether they are production employees, office employees, or home office employees. According to the ruling of 14 May 2019, Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each employee to be measured. The Court deems this the only way to ensure the effectiveness of the rights provided for in the Working Time Directive and the Charter.

#### **Background**

A Spanish trade union brought an action against Deutsche Bank SAE, seeking a judgment declaring Deutsche Bank SAE under an obligation to set up a system for recording the time worked each day by its employees. Yet Spanish law does generally not lay down such an obligation, with limited exceptions: It requires only that a record be kept of overtime hours worked. The ECJ was therefore asked to examine whether the Spanish regulation was compatible with European law.

#### **Legal framework under German law**

Under German law, employers are generally only obliged to make a record of the times worked by employees on working days in excess of 8 hours, while time worked on Sundays or public holidays must in all cases be fully recorded (Section 16 Subsection 1 German Working Time Act – ArbZG). This rule was designed to prevent an unreasonable administrative burden (Bundestag Document No 12/5888 of 13 Oct 1993, p. 31).

#### **Reasoning**

The ECJ notes, amongst other things, the importance of the fundamental right of every employee to a limitation on the maximum number of working hours, and to daily and weekly rest periods. Without a requirement to record working hours from the first minute, employees – being the weaker party in the employment relationship – may find it difficult to ensure that their rights are complied with. The ECJ holds that objective and reliable determination of the number of hours worked each day and each week is essential to establish whether the maximum weekly working time including overtime, and minimum daily and weekly rest periods, are complied with. According to the ECJ, a system enabling the time worked by employees each day to be recorded offers those employees a particularly effective means of easily accessing objective and reliable data as regards the duration of

Our Expertise  
Employment & Compensation



time actually worked, which facilitates both the proof by those employees of a breach of their rights and also the verification by the competent authorities and courts of fact that those rights are being observed.

### **Is the decision already having an effect today?**

No, the decision does not impose any immediate obligations to take action. However, it can be assumed that the EU Member States will address the issue in the near future, especially under the expected pressure of the trade unions. Immediately after the ruling was pronounced, the German Minister of Labour, Hubertus Heil, promised a legislative change by 1 January 2020.

### **Impact of the recording obligation**

Besides causing a substantially increased administrative burden, the obligation to record time worked from the very first minute means that employers will be newly required to take appropriate action under the heading of "Working Time Compliance" to, e.g., prevent employees from performing overtime work employers did not request. Overtime work performed either voluntarily or upon request is a common feature of the creative sector, as shown by recent reports of the extreme workload of game developers, also termed "Crunch". The obligation to record time worked from the very first minute will clearly facilitate the tasks of occupational safety and health authorities, as the same number of control officers will be able to monitor compliance with working time limits in a much larger number of companies. To avoid the risk of a fine or even a prison sentence, companies should take appropriate action now to ensure their employees are employed in accordance with the provisions of the Working Time Act.

Financially, the ruling may result in an increased enforcement of overtime pay. At present, claims for compensation of overtime work are often rejected due to the fact that employees bear the burden of proof that overtime work has in fact been performed. With the introduction of a recording obligation, such proof would no longer be a problem.

### **Implementation requirement as potential trigger to introduce "Working Time Act 4.0"**

All EU Member States will be forced to implement the ECJ ruling. According to the ECJ press release, Member States will be given discretion as to the form an objective, reliable and accessible system enabling the duration of time worked each day by each employee to be measured may take. The pertaining national provisions shall in particular take account of the particular characteristics of a given sector of activity, or the specific characteristics of a given company, including its size.

The German Working Time Act is in urgent need of reform in order to meet the challenges of today's "Work 4.0", and it is to be hoped that the legislator will take the Luxembourg ruling as an opportunity to modernise it. Besides an adjustment of the rigid maximum working hours laid down in the Working Time Act, a reduction of the current mandatory rest period of 11 hours (Section 5 Subsection 1 ArbZG) – that is hard to observe where, say, a parent works in the morning and in the evening to keep the middle of the day free for family time – should be considered.

## Practical notes

Companies will need to prepare themselves to be able to react quickly to upcoming amendments of the laws governing the recording of time worked, and the above-described consequences. While it is still too early to give detailed strategic advice – it is as yet unclear how Germany intends to implement the ECJ ruling – it does seem likely that the ruling will not mean the end of trust-based working time. That said, companies may wish to start thinking about new ways to fully record the duration of time worked by each of their employees. Further, companies may wish to prepare for the worst case scenario and examine already today how work peaks can be absorbed in the short term without breaching the provisions of the Working Time Act. One option would be increased use of temporary agency employees or recruitment of new staff, although this may be hindered by the current labor deficits. Strategically, it will be necessary for companies to consider which creative working time models, coupled with intelligent work organization, they can offer in future in order to meet the new requirements. Under the heading of "Working Time Compliance", this may include introducing effective systems to ensure that employees are "protected from themselves" and discouraged from performing overtime work the employer did not request. A tried and tested example is the introduction of a traffic light system featuring a prescribed escalation process that identifies risk cases at an early stage.



Katja Häferer  
[katja.haeferer@bakermckenzie.com](mailto:katja.haeferer@bakermckenzie.com)



Dr. Matthias Köhler, LL.M.  
[matthias.koehler@bakermckenzie.com](mailto:matthias.koehler@bakermckenzie.com)

---

## Baker & McKenzie - Partnerschaft von Rechtsanwälten und Steuerberatern mbB

### Berlin

Friedrichstrasse 88/Unter den Linden  
10117 Berlin  
Tel.: +49 30 2 20 02 81 0  
Fax: +49 30 2 20 02 81 199

### Dusseldorf

Neuer Zollhof 2  
40221 Dusseldorf  
Tel.: +49 211 3 11 16 0  
Fax: +49 211 3 11 16 199

### Frankfurt am Main

Bethmannstrasse 50-54  
60311 Frankfurt / Main  
Tel.: +49 69 2 99 08 0  
Fax: +49 69 2 99 08 108

### Munich

Theatinerstrasse 23  
80333 Munich  
Tel.: +49 89 5 52 38 0  
Fax: +49 89 5 52 38 199

[www.bakermckenzie.com](http://www.bakermckenzie.com)

### Get Connected:



This client newsletter is prepared for information purposes only. The information contained therein should not be relied on as legal advice and should, therefore, not be regarded as a substitute for detailed legal advice in the individual case. The advice of a qualified lawyer should always be sought in such cases. In the publishing of this Newsletter, we do not accept any liability in individual cases.

Baker & McKenzie - Partnerschaft von Rechtsanwälten und Steuerberatern mbB is a professional partnership under German law with its registered office in Frankfurt/Main, registered with the Local Court of Frankfurt/Main at PR No. 1602. It is associated with Baker & McKenzie International, a Verein organized under the laws of Switzerland. Members of Baker & McKenzie International are Baker McKenzie law firms around the world. In common with terminology used in professional service organizations, reference to a "partner" means a professional who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

© Baker McKenzie