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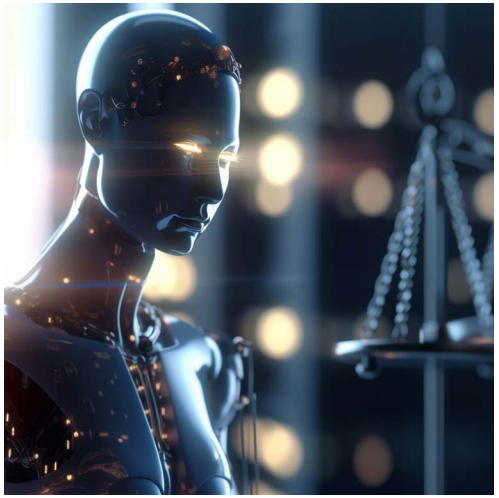

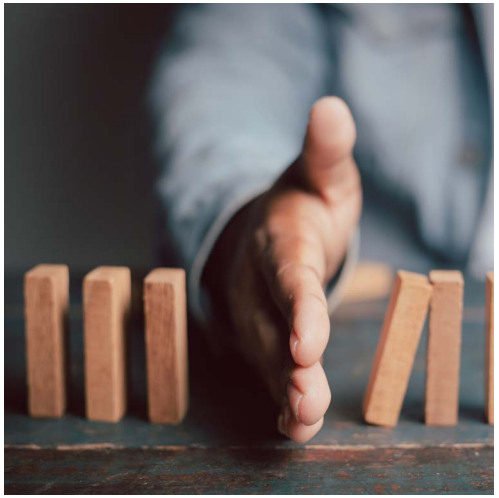

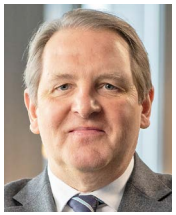

Prof. Dr.
Thomas Wegerich
Editor
LaborLawMagazine

Dear Readers,

Artificial Intelligence (AI) will find its way into everyday life, say our authors Wolf J. Reuter and Michael Riedel. But what does this mean for German Labor Law? The answer: AI will permanently change the world of work. You should know, which consequences this will have in practice. The article is a must-read.

The German Federal Ministry of Labor and Social affairs has presented al long-awaited draft amendment to the Working Time Act. If the bill passes the legislation process and comes into force, the duty for employers to precisely record the working hours of their employees will cause a big shake up – and not just on the legal market. Dr. Hagen Köckeritz has all the details.

Dr. Sebastian Jungermann explains the key elements to the 11 th GWB amendment, the Competition Enforcement Act, which has only recently been given the nod by the German cabinet. As you will see, a new Antitrust Law with claws and teeth appears to be on the legal horizon.

Sincerely yours,

Thomas Wegerich

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The density of legal regulations for AI is going to increase. It is important to carefully observe which regulations the legislator creates at national and European level. It is expected that decision-making powers in companies may only be outsourced to AI to a limited extent.

Artificial Intelligence and German Labor Law: AI will permanently change the world of work

An inventory of the current situation

By Wolf J. Reuter and Michael Riedel

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Since the publication of ChatGPT at the latest, the topic of Artificial Intelligence (AI) has been on everyone's lips. The chatbot has shown to a broad public what AI can do and that AI will find its way into people's everyday lives.

The current high level of attention paid to AI provides a reason to examine the significance of AI in terms of labor law. The following article is dedicated to this topic. The authors see four fields of action that HR managers should be aware of.

Labor law assessment of AI applications

AI is currently used in companies mainly as a supplement and support in the form of individual AI applications. From the perspective of labor law, the question of the legal admissibility of individual AI application always arises. In this regard, protecting the personal data of applicants and employees, employment data protection, anti-discrimination law and co-determination in companies must be taken into account.

Active sourcing using AI

Active sourcing refers to measures designed to identify suitable candidates for a position. Using AI, HR managers can have suitable applicants suggested to them from databases for the profile they are looking for. This involves accessing data on potential candidates from professional networks such as LinkedIn or Xing. As long as the data processing is limited to data from professional networks that have been made public by the candidates themselves, this data processing is generally permissible.

Robo recruiting

Things become more difficult when the recruiting process is largely taken over by AI. It would be technically possible, for example, to record job interviews or telephone interviews with applicants. AI can evaluate the applicants' language and then make statements about candidates' character traits. While such tools may be widespread in the USA, they are difficult to reconcile with German data protection law. This is true even if the applicant has consented to the collection and analysis of this data.

Workforce planning using AI

AI tools can also optimize staff deployment. As far as digital scheduling is concerned, scheduling employees (e.g., through duty rosters) is familiar territory. AI can be used to optimize the scheduling of employees based on knowledge previously gained about them.

The evaluation of employee performance data by AI, on the other hand, is a source of concern for employee representatives. However, these concerns are not particularly justified. Warnings and dismissals of employees for poor performance are recognized in German labor law. However, they hardly play any role in practice because poor performance can barely be proven in court. The use of AI will make it more difficult for low performers in the future. This is because AI can analyze qualitative and quantitative benchmarks on the basis of which personnel decisions can be made in a comprehensible manner.

AI-controlled instructions

Through the use of AI, instructions to employees are increasingly no longer issued directly by human superiors, but by AI-supported applications. There is nothing intrinsically wrong with this from a labor law perspective.

However, if the AI evaluates the work and performance behavior of employees and subsequently issues instructions to optimize the work process, the monitoring obligations of the "natural" supervisor will increase. Since instructions must always comply with equitable discretion, this limit must be observed. Employers cannot rely on the fact that AI tools issue instructions to employees on their own.

Selection decisions using AI

AI tools are also used to terminate employment. For example, AI-supported analyses can be used to make the social selection to be made when downsizing and to determine the employees who will be laid off. However, employers must be able to explain the criteria on which the social selection is based for subsequent dismissal protection proceedings. Simply referring to the selection process by AI is not sufficient.

In particular, Article 22 (1) of the General Data Protection Regulation (GDPR) stands in the way here. According to this, employees have the right not to be subject to a decision based solely on automated processing – including profiling – which produces legal effects concerning them or similarly significantly affecting them.

Impact of AI deployment on HRM

It is not possible today to foresee in detail how AI will change the world of work. What is certain, however, is that AI will bring about comprehensive change processes.

The automation of tasks through digitalization and the use of AI will be at the center of this. New activities will emerge through AI, new forms of work will develop. Jobs that can be easily replaced by AI applications will be lost. The implementation of this adaptation process is probably the greatest challenge that AI will pose to HR managers.

German labor law provides suitable instruments for the emerging steps. For example, the recruitment of skilled workers must be prepared, employment contracts must be adapted, transfers and dismissals must be carried out. The legal design of qualification agreements will also become more important than in the past if employees are to be made fit for the new AI working world.

Legislator reactions to AI

The use of AI is leading to increasing reactions from legislators.

Artificial Intelligence Act

For example, the EU Commission has proposed the Artificial Intelligence Act (AIA), a regulation establishing harmonized rules for artificial intelligence (COM/2021/206 final). The draft provides for a risk assessment for AI systems, primarily from the point of view of the protection of personal rights. Depending on the risk classification, certain applications will be prohibited. AI applications used in the employment relationship, including its justification, are classified as high-risk AI systems. This means that although these applications are not prohibited in principle, they will be associated with special obligations for the employer.

Article 22 (1) GDPR

As has already been mentioned, Article 22 (1) of the GDPR is particularly important. It must be expected that the idea behind this will become a central principle for AI in the employment relationship. Decisions taken by means of AI vis-à-vis employees will have to be traceable – at least indirectly – to a natural person or a body.

Section 80 (3) BetrVG

If there is a works council at a company, the introduction and use of an AI system is usually subject to the works council's co-determination pursuant to section 87 (1) 6 of the German Works Constitution Act (BetrVG). This is because AI tools are technical devices designed to be able to monitor the behavior or performance of employees. It makes sense for the parties involved to regulate the relevant aspects in a company agreement.

One of the few provisions of labor law that already explicitly mentions AI is section 80 (3) of the BetrVG. Only companies with a works council are affected. If the works council has to assess the introduction or application of artificial intelligence in order to carry out its tasks, the works council may call in an external expert – at the employer's expense.

Using legal tech to handle labor law cases

A fourth area of action where the use of AI has an impact concerns the way HR managers, employment law departments and employment lawyers work. Lawyers should not fool themselves. Their work can also be replaced – in some areas – by AI. Simple legal questions can already be answered using legal tech. AI tools are suitable for getting an initial overview at least. Increasingly, legal value judgements in the run-up to personnel decisions are being prepared by AI. AI can also draft opinions in labor court proceedings, as far as standard cases are concerned.

As a result, AI will change the cooperation between human resources experts and labor lawyers. However, it is not expected that AI will replace individual labor law advice tailored to the individual case – especially in complex labor law cases and special matters, which frequently occur in labor law.

Conclusion

Individual AI applications should be subjected to an admissibility check under labor law before they are implemented. Not everything that is technically possible is permitted under German law.

Probably the greatest challenge posed by the use of AI is to implement the expected transformation process in the world of work. AI is going to permanently change the world of work. Labor law provides suitable instruments for this.

The density of legal regulations for AI is going to increase. It is important to carefully observe which regulations the legislator creates at national and European level. It is expected that decision-making powers in companies may only be outsourced to AI to a limited extent.

Finally, AI is going to have an impact on HR work itself, the work in labor law departments and the cooperation between HR and labor lawyers. In this respect, too, AI will take over work steps. ←

New rules proposed to record working time

Working Time Act – more questions than answers so far

By Dr. Hagen Köckeritz, LL.M. oec. int.

The new regulations expressly provide that employers will be able to continue to reach agreements with their employees in the future, according to which the employer waives the determination of the beginning, end and control of contractually agreed working time.

On 18 April 18 2023, the German Federal Ministry of Labor and Social Affairs (BMAS) presented the long-awaited draft amendment to the Working Time Act and other regulations. Following the decision of the Federal Labor Court of 13 September 2022 (case no. 1 ABR 22/21), the new law is intended to specify how employers must precisely record the working hours of their employees. The BMAS has not succeeded in making a big splash. Instead, the bill comes with a number of inconsistencies and questionable simplifications for employers bound by collective bargaining agreements (CBAs).

Starting point

On September 13, 2022, the German Federal Labor Court (Bundesarbeitsgericht) established, to the surprise of many, an obligation to comprehensively document the working hours of employees. The court identified this obligation by interpreting Section 3 (2) of the German Occupational Health and Safety Act (Arbeitsschutzgesetz - OHSA) in accordance with European law. According to the Federal Labor Court, employers within the scope of the OHSA are obliged to introduce and use a system with which working time can be recorded. The court did not make any further specifications on the design of the working time recording system. Section 3 OHSA, as a general clause, only regulates in the abstract that the employer is obliged to take measures that affect the safety and health of employees at work. Section 3 (2) OHSA determines that a suitable organization must be created to implement the aforementioned measures and that certain precautions must be taken to ensure that the measures are also implemented effectively. More specific regulations on the recording of working time, which take into account the de-

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cision of the Federal Labor Court, are missing. Section 16 (2) of the Working Time Act (Arbeitszeitgesetz - WTA) has so far essentially regulated that employers are obliged to record the working hours of employees in excess of the working hours per working day specified in Section 3 (1) WTA. This noticeably falls short of the far-reaching obligation that the Federal Labor Court has read into Section 3 (2) OHSA.

Consequently, employers were eagerly awaiting the BMAS's proposals for adapting the Working Time Act. In addition to more specific requirements for the design of the working time recording system, many were also hoping for greater flexibility in the Working Time Act, which would allow them to take advantage of the opportunities offered by the EU Working Time Directive. Compared to expectations, the bill that has now been presented is more than sobering.

Recording daily working hours electronically

The bill initially stipulates that employers must record the start, end and duration of employees' daily working hours on the day on which they perform their work. According to the explanatory memorandum, this is the only way to ensure objective and reliable recording. Later corrections of incorrect entries or making up for missed entries are not ruled out, but these must be made promptly. Common time recording devices or electronic applications, such as apps on cell phones, or even conventional spreadsheet programs (i.e., Excel, for example), can then be used for electronic recording. It should also be possible to collectively record working time by using and evaluating electronic shift schedules. However, this would require that the start, end and duration of daily working time remain calculable for the individual employees. As a result, individual deviations from the shift schedule must be documented. These records must be kept in German.

> "The bill comes with a number of inconsistencies and questionable simplifications for employers."

The bill includes transitional provisions for the obligation to introduce and use electronic recording of working hours (instead of manual documentation) at least. In general, recording does not have to be electronic until one year after the law comes into force. For employers with fewer than 250 employees, this period is two years, and for employers with fewer than 50 employees, five years.

Recording by employees or third parties permitted

The bill provides that the employer may also assign the recording of working hours to employees or third parties (e.g., supervisors or also user companies). However, ultimate responsibility remains with the employer in this case as well. The employer must prove, for example, that it has properly trained and instructed employees, and that it checks the implementation of the recording of working hours on a random basis from time to time at least.

Trust-based working time "light" remains possible

The new regulations expressly provide that employers can continue to reach agreements with their employees in the future, according to which the employer waives the determination of the beginning, end and control of contractually agreed working time. However, in this case it is still necessary that the employer becomes aware of violations of the statutory provisions on the duration and location of working hours and rest periods. Consequently, as a first step, it is necessary to record the start, end and duration of working time even for trust-based working time. Violations could then be reported to the employer, for example, through automatic system messages.

Contradictory regulations on the duration of the retention period; information rights

The bill contains contradictory statements on the duration of the retention period. In part, it is stipulated that time sheets must be kept for at least two years. In a different context, it then states that the required records must be kept for the duration of the employment relationship, but no longer than two years. Employees must be informed of the recorded working hours on request. They may also request a copy (e.g., printout) of the records.

Extensive exceptions for employers bound by CBAs - possible violation of Art. 9 (3) of the German Constitution

The bill provides that only employers bound by CBAs may deviate from the essential requirements of the statutory regulations. The basis for such a deviation can be either a CBA or a works agreement permitted on the basis of a CBA. Instead of electronic recording, for example, manual recording in paper form may be sufficient. It may also be possible to record working time up to seven days after the day on which the work was performed. Finally – and this is particularly surprising – it would be possible, on the basis of CBAs, to dispense entirely with the recording of working time in the case of employees for whom total working time is not measured or cannot be determined in advance because of the special characteristics of the activity performed, or can be determined by the employees themselves. These far-reaching opening provisions for employers bound by CBAs are not comprehensible. There is no factual explanation as to why, in the case of employers not bound by CBAs, only an electronic record of working time created on the day the work is performed satisfies the requirements of objectivity and transparency in the recording of working time, while in the case of employers bound by CBAs, a manual timesheet created one week later can also suffice. With regard to the possibility of excluding certain groups of employees from recording working time, the explanatory memorandum to the bill correctly refers to Art. 17 (1) of the EU Working Time Directive. However, in contrast to other possible derogations in Art. 17 (2), the Directive does not stipulate that derogations are only possible by means of legal and administrative provisions, or by means of CBAs, or agreements between the social partners. At this point, the legislator falls short of the possibilities offered by the EU Working Time Directive. The far-reaching flexibility options for employers bound by CBAs lead to a considerable disadvantage for companies not bound by such agreements. The freedom of choice protected by Art. 9 (3) of the German Constitution not to join an employers' association (so-called negative freedom of association) is considerably restricted. Consequently, there are at least serious doubts about the constitutionality of the proposed regulation. However, in view of the current demands of the Federal Minister of Labor, Hubertus Heil (Social Democratic Party), for a national action plan to increase collective bargaining coverage, the planned improvement in the position of employers bound by CBAs with regard to recording working time is not surprising.

No clarity for "senior managerial employees"

The bill does not provide any clarity as to which requirements apply to senior managerial employees (leitende Angestellte) when it comes to time recording. It is true that the Working Time Act does not apply to senior managerial employees within the meaning of Section 5 (3) of the Works Constitution Act (Betriebsverfassungsgesetz – WCA), so that the provisions on time recording pursuant to Section 16 of the Working Time Act do not apply to this group. However, the Federal Labor Court has derived the general obligation to record working time from Section 3 (2) OHSA, which does not provide for any exceptions for senior managerial employees. How exactly the group of executive employees will be treated now remains open.

Risk of fines

Previously, employers were not subject to fines for violations of the obligation to record working hours in detail, as derived from Section 3 (2) OHSA. Violations of Section 3 OHSA have not been covered by Section 25 OHSA. It is true that violations of the obligation to record overtime regulated in Section 16 (2) WTA were already subject to fines. However, Section 16 (2) WTA fell well short of the requirements that are now to be expected. With the new rules coming into force, violations of the obligation to record the start, end and duration of daily working time now carry the risk of a fine. The same applies to failure to keep working time records for at least two years. Exceptions are again likely to apply to senior managerial employees who are not covered by the Working Time Act.

Outlook

The bill that has now been presented has reignited the political debate on the recording of working time and the urgently needed flexibility in this area. The bill still shows significant shortcomings and inconsistencies that need to be eliminated. The simplifications for employers bound by CBAs will also not meet with the approval of all political camps. ←

The 11th GWB Amendment

A new antitrust law with claws and teeth?

By Dr. Sebastian Jungermann

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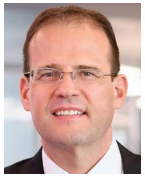
It is certain that the powers of the Bundeskartellamt will continue to be strengthened in the future; the new instruments of intervention make this abundantly clear.

On 5 April, 2023, the German cabinet passed the 11th GWB Amendment, the so-called "Competition Enforcement Act". This government draft was preceded by a heated debate on the bill of the Federal Ministry of Economics and Climate Protection, which was introduced in September 2022.

The key elements of the draft bill remained unchanged, such as the significant expansion of competences in favor of the German Federal Cartel Office (Bundeskartellamt). However, following massive criticism from the industry, the legal profession and academia, these have now been somewhat toned down, while at the same time the procedural and legal defense mechanisms of those affected have been increased. It is expected that the 11th GWB Amendment will bring about a significant tightening of the GWB, however; as before, work on a significant tightening of antitrust law is being carried out to provide "claws and teeth".



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The sector inquiry and new intervention instruments under Section 32e and Section 32f of the draft

Following a sector inquiry, the Bundeskartellamt should in future be able to put a stop to significant and persistent disruptions of competition quickly and effectively. It is envisaged that behavior-oriented and quasi-structural obligations can be enforced, such as obligations regarding access to interfaces or data. It should also be possible, for example, to impose requirements on business relationships between companies in the markets under review and at different market levels, or on certain contractual arrangements, as well as obligations on the organizational separation of business units. The introduction of unbundling, which has been discussed for many years, is to be made possible as an ultima ratio to eliminate a significant, persistent or repeated distortion of competition, whereby abuse is not required. Where a merger has been cleared under merger control procedures, a ten-year period of protection of legitimate expectations will be granted.

In Section 32f (3) of the draft, the wording has been softened compared with the prior draft, but the Bundeskartellamt still has far-reaching new powers. Section 32f (3) 1 of the draft now reads: "The Bundeskartellamt may determine by order that there is a significant and continuing distortion of competition in at least one nationwide market, several individual markets or across markets, to the extent that the application of the powers under Part 1 is not likely to be sufficient, according to the information available to the Bundeskartellamt at the time of the decision, to adequately counteract the identified distortion of competition."

It is also noteworthy and welcome that the new procedure is now structured in two stages. A company affected by remedial measures can now already seek judicial review of the order determining that there is "significant and continuing anticompetitive interference". Accordingly, the results of a sector inquiry can also be subject to judicial review. This possibility did not exist in the draft bill. Previously, legal protection was possible against the remedial measures, so that the results of the sector inquiry could at best have been reviewed incidentally.

> "It is planned to make the existing Section 39a of the GWB (Competition Enforcement Act) much stricter and broader."

In addition, Section 32f (3) 3 and 4 of the draft will now also further define the criteria for selecting the addressees, so that the focus will basically only be on those companies that have made a significant causal contribution to the distortion of competition. Their market position will also be taken into account, so that primarily those companies that were assessed to have market power beforehand are likely to be affected by future remedial measures.

Finally, Section 32f (5) 3 of the draft also makes it clear that the anticompetitive effect will only be continuous if it has existed permanently over a period of three years, or has occurred repeatedly, and there are no indications at the time of the order that the effect will in all probability cease within two years.

An infringement-independent unbundling order as the ultima ratio under Section 32f (4) of the draft is now restricted to market-dominant companies. The requirements for proportionality have also been specified. Unbundling will only be possible if it can be guaranteed that the distortion of competition will be eliminated or significantly reduced, if behavior-oriented remedies are not possible or would not be at least equally effective.

With regard to the proceeds of unbundling, Section 32f (4) 7 and 8 of the draft require minimum proceeds of 50% of the value. This provision is flanked by a compensation provision in the event of a shortfall in value. If the actual sale proceeds fall short of the value of the part of the company determined by an auditor commissioned and paid by the Bundeskartellamt, the government must pay half of the difference between the determined value of the part of the company, and the sale proceeds achieved, to the company concerned. This is intended to address the constitutional concerns of unbundling.

Finally, it is envisaged that, following a sector inquiry, companies may be required to report all relevant mergers in certain markets, provided that the acquirer generated sales in Germany of more than €50 million in the last fiscal year and the company to be acquired generated sales of more than €500,000. It is also planned to make the existing Section 39a of the GWB much stricter and broader.

Skimming off advantages from antitrust violations under Section 34 of the draft

In addition, it will be easier and more effective in the future to skim off advantages gained by the companies concerned as a result of antitrust violations. If an infringement of competition law is proven, these excess profits will be skimmed off the companies. A legal presumption is planned, according to which a company will have achieved an advantage of 1% of its domestic sales with the product or service involved in cartel activities or abuse as a result of the proven antitrust violation. Hardships will be avoided by an upper limit of 10% of the previous year's total sales in relation to the authority's decision. Rebuttal of this presumption should only be possible under very restrictive criteria.

The Digital Markets Act (DMA) and the adaptation of procedural regulations

In addition, the 11th GWB Amendment is intended to create the legal basis for the Bundeskartellamt to provide the European Commission with appropriate support in enforcing the new Digital Markets Act. The so-called private enforcement, the civil court enforcement of the DMA, is also an objective of the amendment.

Comment

It is certain that the powers of the Bundeskartellamt will continue to be strengthened in the future; the new instruments of intervention make this abundantly clear. With the introduction of the planned market structure control procedure independent of infringements and abuse, the German watchdog will receive a new and very sharp sword, and it remains to be seen whether this will be used with the necessary caution.

On the one hand, the approach of extending preventive merger control to cases below the thresholds of the GWB follows developments in the USA, where mergers below the thresholds have already been taken up for many years. On the other hand, the EU Commission is also marching in this direction, for example by encouraging Member States to refer cases under Article 22 of the ECMR, see Illumina/Grail. 50 years after the Continental Can ECJ decision, the ECJ ruled (again) in March 2023 in Towercast (C-449/21) that control of non-notifiable mergers may also take place on the merits detailed under Art. 102 TFEU. This is not conducive to legal certainty, but other regulatory tightening, such as the globally stricter investment control and the newly-introduced control of third-party subsidies at EU level, will also contribute to making planning and legal certainty more difficult in the planning and implementation of corporate transactions.

The new skimming rule, together with the legal presumption of a 1% advantage, will certainly have an impact on antitrust damages cases in Germany. Whether this is intended or will be accepted is unclear. In any case, the rule will lead to a reigniting of the discussion on the introduction of a similar presumption for cartel damages cases as well. ←

Social security obligations

Case law and status determination procedure

By Tobias Grambow

It is not easy to reclaim contributions from the employee and it is usually only possible to reclaim part of the contributions as long as the contractual relationship still exists. In the worst case, non-payment of social security contributions may even be punishable in criminal law.

Managing Directors of German GmbHs (private limited companies) and members of the executive boards of German AGs (public limited companies) have to be aware that they might be employees with regard to social security schemes.

Some companies, especially startups, prefer engaging freelancers to employees. The reason is quite obvious. Employees have statutory rights and social insurance contributions have to be paid, which means freelancers are cheaper and more flexible to engage. But a lot of freelancers are in fact employees and subject to social insurance scheme.

Managing Directors (GmbH)

GmbHs are represented by managing directors (Geschäftsführer). According to the German Federal Social Court, managing directors of a GmbH are employees with regard to social security scheme. This means that they are subject to compulsory social insurance contributions. They are

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subject to the instructions of the owners and are integrated in the work organization of the GmbH. However, the Federal Social Court makes two exceptions:

If a managing director holds at least 50 percent of the shares in the GmbH, they can prevent resolutions that affect them negatively. In this case, the managing director would not be subject to instructions. However, even if the managing director only holds a smaller share in the company, they will not be subject to social security contributions if they hold a blocking minority granted in the articles of incorporation. Therefore, they must be in a position to prevent resolutions from being passed with their veto, despite the fact that their share is less than 50 percent.

As a rule, agreements and resolutions outside the articles of incorporation are not relevant with regard to social insurance. Likewise, it is not sufficient for exemption from social security, for example, that

- a managing director works largely independently and without instructions, if the shareholders only exercise a limited right of instruction,
- the articles of incorporation stipulate restrictions on the right of instruction,
- a managing director is authorized as a sole representative of the company by a provision in the articles of incorporation or is entitled to appoint such a managing director or can only be dismissed for due cause,
- instructions are not issued to a managing director of a family business due to family ties.

Executive Board Members (AG)

Due to their position under the German Public Limited Company Act, members of the executive board of an AG are not personally dependent. A member of the executive board can perform their duties independently and manage the company on their own responsibility. Nevertheless, according to the social courts, executive board members of an AG are treated as employees with regard to social insurance schemes.

> "Board members usually receive high remuneration. For this reason alone, they are not subject to compulsory health and long-term care insurance."

In practice, however, the issue of compulsory social insurance rarely arises. The legislator has exempted executive board members of AGs from compulsory insurance in the statutory pension scheme. In the area of employment benefits, too, executive board members are exempt from compulsory insurance. Therefore, essentially only statutory health insurance and social long-term care insurance remain. However, board members usually receive high remuneration. For this reason alone, they are not subject to compulsory health and long-term care insurance.

Managing directors of a Societas Europaea (SE) who are also members of an administrative board are treated equally to members of the executive board of an AG with regard to social security regulations.

Freelancers

Freelancers are only genuine freelancers, and are in principle not subject to social security contributions, if they are independent of instructions and are not integrated in the work organization. If freelancers work on the business premises of the principal, this is already a strong indication of operational integration. A freelancer should also offer their services to other clients and, if necessary, do advertising. However, the mere fact that the freelancer has other clients does not mean that they are self-employed. In practice, the applicability of freelance work that is not liable for social-security contributions often fails due to the lack of the risk typical for entrepreneurs. The freelancer has to bear a risk of loss, e.g., remuneration liabilities towards their own staff, rental liabilities for office space and equipment, travel costs, etc.

The following criteria are typical for self-employed activities exempt from social-security contributions:

- the freelancer has their own office, if required for the activity
- the freelancer does not have a workplace in the principal's company (no e-mail address, no telephone extension, no business cards, etc.)

- the freelancer is allowed to render their duties with their own staff or subcontractors
- no fixed hourly rates or fixed monthly remuneration
- no minimum/maximum/regular working hours
- the freelancer also offers their services to other clients (in particular through advertising)
- the freelancer also actually works for other clients.

Incorrect judgement of the status under social security law

If an insurance obligation for an alleged "freelancer" is determined, the principal must pay the unpaid social security contributions up to the limit of the statute of limitations (at least four years). This includes not only the employer's contributions, but also the contributions that should have been paid by the employee. It is not easy to reclaim contributions from the employee and it is usually only possible to reclaim part of the contributions as long as the contractual relationship still exists. In the worst case, non-payment of social security contributions may even be punishable in criminal law.

In case of doubt, a status determination procedure should be initiated at the clearing office (Clearingstelle) of the German Pension Insurance (DRV Bund) before starting the employment, but at the latest within one month after its commencement the employment. This has, among other benefits, a very important advantage: If the DRV Bund determines that the employee is obliged to pay social security, the total social security contribution will only become due for payment when this decision becomes legally binding (if necessary, after social court proceedings). Objections and complaints have a suspensive effect. The situation is different in the case of a contribution decision following a subsequent pension review. Here, objections and complaints do not in principle mean that the required contributions would not have to be paid for such a long time. In addition, it is possible to apply for an expert opinion from the DRV Bund on the employment status of contractors in the same employment relationship. This also creates (some) certainty.

The status determination procedure should not be initiated without preparations. It is strongly recommended to first check the status of the freelancer oneself or with the support of a lawyer, and to what extent the freelancer's activity or contract can be adapted in order to avoid social security liability.

Conclusion

It is not always easy to determine whether an executive or a freelancer is employed with regard to social security schemes or not. Mistakes or negligence in this area may result in extensive subsequent claims made by the DRV Bund and criminal proceedings may be initiated. ←

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