



# German Employment Law Update – May 2023

Welcome to our newsletter, with a summary of the latest news and developments in German employment law.

## In this issue:

- [Case law updates](#)
- [Legislative developments](#)
- [Other news](#)



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# Case law updates

**Extended working time recording obligations for German employers:** On 13 September 2022, the German Federal Labour Court (Bundesarbeitsgericht – BAG) announced an extension of the employer's obligation to record working time. In December 2022, the court published the full reasoning, providing further guidance on what is required from German employers. The BAG stated that, with immediate effect, employers are obliged to introduce a system for recording the entire working time of their employees, i.e., the start time, duration and finish time of their work, as well as break periods and any overtime. The BAG decided that, for this purpose, it is not sufficient to provide employees with a working time recording system – employers also have to ensure that the system is properly applied. Employers are still allowed to delegate the time recording to employees, but random checks will now be unavoidable. These employer obligations exist irrespective of the size of the company and of the existence of a works council.

**Equal pay and gender pay gaps:** In a decision dated 16 February 2023, the BAG stated that equal pay is not a matter of negotiation. In particular, the BAG decided that the requirement of equal pay for the same work cannot be circumvented by skilled wage negotiations. According to the decision, the employer could not successfully claim that the higher base salary of a male colleague was not related to gender, but to the fact that the male colleague had negotiated a higher salary during the job interview. The court considered this a violation of the prohibition of pay discrimination based on gender. Consequently, the BAG decided that the female employee was entitled to a higher base salary, as well as compensation under section 15 (2) of the Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG) due to gender discrimination.

**Equal pay in case of part time employment:** On 18 January 2023, the BAG announced a decision which strengthens the principle of equal pay for equal work. The background to the claim was that a provider of an emergency rescue and ambulance service employed paramedics on either a full time or part time basis. While the employer could issue directions regarding the working time and shift plan to the full time paramedics, the part time paramedics were free to sign up for and/or accept or decline requested shifts. Due to this difference and the claimed higher administrative effort in planning the deployment of the part time paramedics, the employer paid a reduced hourly wage to the part time paramedics, despite their having the same qualifications as the full time paramedics. In its decision, the BAG found that this practice violates the prohibition of discrimination without objective reason set out in section 4 (1) of the Part Time and Fixed Term Employment Act (Teilzeit- und Befristungsgesetz – TzBfG) and required the employer to pay the claimed additional compensation.

**Limitation period of three years also applies to financial compensation claims for accrued holiday:** At the end of 2022, the BAG ruled that holidays provided for under an existing employment relationship cannot be time-barred if employers do not fulfill their duty to inform. They must inform their employees of their holiday entitlement and notify them that the entitlement will expire if no holiday request is submitted. This transposed a ruling from the European Court of Justice (ECJ) into German law. Based on that ruling, some employers feared a flood of lawsuits over the payment of accrued holiday entitlement under employment relationships that had ended years earlier. In its ruling on 31 January 2023, the BAG clarified that a limitation period of three years continues to apply to financial compensation claims for accrued holiday after the end of an employment relationship. Longer limitation periods temporarily apply to old cases, i.e. to compensation claims that arose before the ECJ ruling of 6 November 2018.



## Legislative developments

**Introduction of an electronic certificate of incapacity to work:** Since 1 January 2023, there has no longer been an obligation for employees who are insured under statutory health insurance to provide a paper form medical certificate in case of incapacity to work due to illness. Employees will only have to see a doctor to determine the existence and expected duration of the incapacity to work and obtain a medical certificate for evidentiary purposes. The electronic certificate of incapacity to work (the eAU) itself will be sent digitally by the doctor to the health insurer. Once an employee with statutory health insurance has notified their employer that they are off work sick, the employer is obliged to obtain the eAU directly from the health insurer. This will make life easier for employees off sick, as they will no longer have to ensure that the certificate reaches the employer in good time: it is now up to the employer to obtain the eAU digitally. Unlike in the past, neither the name of the doctor nor their qualifications are stated on the certificate. For those with private health insurance, nothing will change for the time being: they still need to provide the paper form certificate.

**Inflation compensation payment option for employers until 2024:** On a one-time basis, employers can pay their employees up to €3,000 free of tax and social security contributions until 31 December 2024. The payment is purely optional: employers are free to decide whether to pay it and in what amount. It can be made as a lump sum or in instalments. If an inflation compensation payment is made, however, the principle of equal treatment needs to be applied and it must be paid to all employees in the company including trainees, working students and mini-jobbers. Any payment must be made in addition to the base salary, so it is not possible to pay inflation compensation instead of salary. It must be clear to the tax office and social security on the salary statement that it is an inflation compensation payment. We recommend indicating the payment accordingly.

**Draft Bill of Working Time Act:** In response to the above-mentioned BAG decision on extended working time recording obligations for employers, the Ministry of Labour and Social Affairs announced that it will update the Working Time Act (Arbeitszeitgesetz – ArbZG). On April 18, 2023, it has presented the first draft bill (*Referentenentwurf* - RefE) to amend the ArbZG. With the draft bill, taking into account decisions of the ECJ and the BAG, a legislative basis is to be created for the recording of the total working time. The RefE specifies the manner in which working time is to be recorded: Employers are to be obliged to electronically record the start, end and duration of the daily working time of their employees and the recording needs to be done on the day on which the employees perform their work. The draft bill also contains transitional regulations, an exception for small businesses to use non-electronically forms of recording as well as an option for exceptions to be agreed upon in collective agreements. This is the first step in the legislative process. As a next step, a coordination among the different German Ministries is required.

**New contribution threshold for pension insurance with implications for overtime compensation:** As usual every year, the monthly income threshold for pension insurance has been adjusted in line with the increase in average salary. In the eastern federal states, it is now €7,100 (€6,750 in 2022), while in the western federal states, it is €7,300 (€7,050 in 2022). In terms of employment contracts, the contribution threshold for pension insurance as described above is a key factor in determining whether or not additional compensation for overtime hours on top of base pay is to be expected. If so, such compensation is, in principle, required by law.

**Entry into force of the Whistleblower Protection Act:** The Whistleblower Protection Act has been passed by the German legislature on Friday, 12 May 2023. The law is the result of the consultation of the Mediation Committee after long negotiations in the German government and is intended to transpose the EU Whistleblower Directive of 23 October 2019 into national law. The Whistleblower Protection Act will come into force one month after promulgation and thus probably in mid-June, 2023. The law will then apply immediately to companies with 250 or more employees and from 17 December 2023 to companies with 50 to 249 employees in Germany. The law requires companies with 50+ employees in Germany to install and operate secure internal reporting systems that give whistleblowers the opportunity to make reports verbally, in writing or, if they wish, in person. The receipt of reports must be confirmed and processed within certain deadlines. In addition, the law contains protective provisions for whistleblowers against disadvantageous measures in connection with the report. Claims for damages by whistleblowers and fines of up to EUR 50,000 are possible for non-compliance with the law.

## Other news

**Short-time work – final audits of allowances granted by state:** Throughout the Covid-19 pandemic, the German government provided easier access to short-time work allowances, which many businesses in Germany took advantage of. For those businesses, the final audit of the benefits granted by the Federal Employment Agency is either upcoming or already underway. The agency's general practice is to conduct final audits (*Abschlussprüfungen*) of the work allowances within seven months of their granting. If the agency deems that false information was given or errors made under the accelerated procedure, companies may face criminal charges in addition to returning payments in full or any overpayments, or facing possible claims for damages.

Affected businesses should therefore ensure they are in a position to actively cooperate in the audit procedure. To that end, for each calendar month of subsidised short-time work, businesses should have the following information ready at hand:

- Payslips
- Timesheets
- Payroll accounts
- The individual employment contracts of the recipients of short-time allowances
- Any relevant collective bargaining agreements
- Existing corporate agreements
- Related letters of termination

In addition, questions will also certainly be asked about statements of outstanding annual leave and any work lost may be verified through a review of order books. Please see the checklist published by [the Federal Employment Agency](#).



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