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PRESS RELEASE

Revolution in the co-determination rights of works council?

Erfurt/Munich 29 August 2022 - The Federal Labour Court (*Bundesarbeitsgericht*, BAG) will decide on 13 September 2022 with regard to the question whether the works council may require the employer to introduce an electronic working time recording system (1 ABR 22/21). "It might become the most important labour law decision of the year", says *Dr Wolfang Lipinski*, Labour Law Specialist and Partner of ADVANT Beiten, a leading German corporate law firm. "The decision could mean a massive bombshell for all companies in which a works council exists", the lawyer continues. The decision could lead to radical changes in the industrial constitution law, as the works council - according to previous court decisions - has not been entitled to a so-called right of initiative for the introduction of technical monitoring equipment such as, for example, a "time clock", a tachograph or similar devices. Right of initiative means that the works council, for instance, may enforce the introduction of a time clock, but also other technical installations or the introduction of a certain software even against the will of an employer if necessary.

The facts of the case are as follows: The employers jointly run an inpatient residential facility. As of 2017, they have negotiated with the works council on the conclusion of a so-called company agreement (an agreement between employer and works council) for recording of working time. At the end of May 2018, they decided not to introduce any electronic time recording in the company. The negotiations were broken off. With the present proceedings, the works council wants it to be established that a co-determination right for the proactive introduction of an electronic time recording exists for the works council. The works council considers that the employees may also have an interest in the introduction of an electronic time recording, precisely where the exact recording of working time and overtime is concerned. The employers, on the other hand, are of the opinion that the co-determination right of the works council for the introduction of technical monitoring equipment pursuant to Sec. 87 (1) No. 6 of the German Works Constitution Act is a mere right of defence for the protection of personal rights of the employees. Accordingly, the works council may not proactively demand the introduction of such equipment.

"Should the Federal Labour Court decide in favour of the works council, the Federal Labour Court would give up its longstanding case law. Since the court has refused such a right of initiative in a relevant decision from the year 1989", explains *Lipinski*. "A change of case law would have far-reaching consequences for the industrial constitution law and business practice. Since the works council could also demand, for instance, the use of other IT systems or software previously not used with the employer, such as Windows

365, MS-Teams, Zoom etc. from the employer in case of affirmation of such a right of initiative. In the absence of an agreement with the employer, a conciliation committee ('arbitration board' with employers' and employees' representatives under the guidance of a neutral chairperson) would have to be convened which may also decide against the will of the employer", according to *Lipinski.* "The extremely high practical relevance also arises from the fact that the technical equipment - pursuant to the previous decisions of the Federal Labour Court - must only be suitable for behaviour control, even if this is provably not the purpose of the employer. In this case, the co-determination of the works council is already to be affirmed according to the Federal Labour Court, thus, the scope of application of the provision concerned is tremendous", the lawyer continues.

"European factors" might also play a role for the decision to be taken on 13 September 2022. The European Court of Justice (ECJ) had decided in 2019 (C-55/18 – CCOO) that the German legislator must adopt a provision under EU law which obliges employers to establish a system, by which the daily working time performed by each employee can be measured. Despite a declaration of intent in the coalition agreement of the governing parties in the past year, the German legislator could not agree on a provision. "It is presumed in part that the Federal Labour Court could take its decision in the light of this case law of the ECJ. From the substantive point of view, however, it is about something different (not about the obligation of the German legislator to adopt a provision for recording of working time, but about the question whether the works council may enforce an electronic time recording in the company). Should the Federal Labour Court, however, agree with the works council, the Federal Labour Court would de facto convert the works council into a kind of 'company police" which - instead of the legislator who has not yet taken action - may force the employer to introduce a comprehensive electronic time recording", explains *Lipinski*. "This has to be refused, as it is unequivocally and quite clearly specified by the legislator according to the present German Working Hours Act that only the working time exceeding eight hours per day has to be recorded by the employer. If one would like to regulate this differently, the legislator is demanded and not the Federal Labour Court as a court which only has to apply existing laws or interpret unclear provisions. In addition, the ECJ does not demand any technical or electronic time recording. A *technical* equipment is, however, a prerequisite for the existence of a co-determination right, with which we are dealing here", according to *Lipinski*. We sincerely hope that the Federal Labour Court, therefore, maintains its previous case law which refuses a right of initiative with convincing arguments and that - as intended by the separation of powers - the legislator adopts a provision".

Lipinski even goes one step further: "It would be best if the German legislator would carry out a comprehensive reform of the laws on working hours. Since in the light of mobile office, working from home, flexible working hours etc. the existing laws on working hours often no longer correspond to the practical reality of life of the parties to an employment agreement. Most urgently, the legislator should strengthen the flexibility in the employment relationship by abolishing the limit of 8 hours work per day and by introducing maximum working hours per week instead", concludes the lawyer.

Dr Wolfgang Lipinski is a Labour Law Specialist and a Partner at ADVANT Beiten. He will be pleased to be at your disposal for interviews.

To facilitate readability, this document does not use the masculine and feminine forms of language at the same time. The generic masculine is used, whereby all genders are equally referred to.

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